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No. (D)

# In The
# Supreme Court of the United States

CANON LATIN AMERICA, INC.,
*Petitioner,*

v.

LANTECH (C.R.), S.A.,
*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972), the Court departed from the traditional view against enforcing forum selection clauses, holding that such agreements were "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." This change in national policy was driven by the recognition that "[f]or at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States." *Id.* at 8. Since 1972, the Court has adhered to this position, reiterating that forum selection clauses are *prima facie* valid. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). The Eleventh Circuit's decision in this case to part ways with the Court's precedent has created a significant conflict among three circuits that must now be resolved.

In breach of a mandatory forum selection clause contained in the parties' international distribution agreement requiring that any suit be brought in Florida, Respondent, a Costa Rican company and formerly one of Petitioner's foreign distributors, commenced an action against Petitioner in Costa Rica seeking more than $6 million in damages. The district court enjoined Respondent from pursuing its Costa Rican lawsuit on the grounds that it frustrated the policy of the United States courts of enforcing forum selection clauses and was vexatious. The Eleventh Circuit reversed, finding that Respondent's first-filed

claim in Costa Rica precluded entry of a foreign anti-suit injunction. Finding that Respondent's Costa Rican lawsuit hinged on a statutory claim that was not raised in the U.S. action, the Eleventh Circuit held that Petitioner could not satisfy the threshold test for relief because the foreign anti-suit injunction would not be dispositive of the Costa Rican lawsuit. In so ruling, the court of appeals gave no weight to the forum selection clause in the parties' distribution agreement. The Eleventh Circuit recognized that its ruling directly conflicted with the Ninth Circuit's decision in *E. & J. Gallo Winery v. Andina Licores, S.A.*, 446 F.3d 984 (9th Cir. 2006), and the First Circuit's decision in *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004) [App. at 8a].

The questions presented are:

1. Whether a party to an international contract is entitled to a foreign anti-suit injunction to enforce a mandatory forum selection clause where the claims raised in the action to be enjoined are not identical to those pending before the enjoining court.

2. Whether a party to an international contract seeking a foreign anti-suit injunction to enforce a mandatory forum selection clause should be required to demonstrate, as a threshold matter, that the parties and claims are the same in both the foreign and domestic lawsuits and that resolution of the case before the enjoining court would be completely dispositive of the action to be enjoined.

## RULES 14.1 AND 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner is Canon Latin America, Inc., a Florida corporation, created in 1996, with its principal place of business in Miami, Florida. Petitioner is a subsidiary of Canon, Inc., and no other publicly-held corporation owns more than 10% of Petitioner's stock. Canon, Inc. manufactures cameras and camera accessories, business machines, mask aligners for semiconductor chip production, special purpose lenses, and electronic components. Petitioner markets and sells Canon® brand products in Latin America and the Caribbean (excluding Puerto Rico and Mexico).

Respondent is Lantech (C.R.), S.A., a supplier of office equipment and operating systems in Costa Rica. Petitioner does not believe that Lantech is owned, in whole or part, by any publicly-held corporation. In late 2004, at or about the time it commenced the lawsuit in Costa Rica, Lantech sold its assets to a Guatemalan company, Difoto, S.A. Lantech claims that it is no longer an operating company capable of being a distributor.

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## PETITION FOR WRIT OF CERTIORARI

Canon Latin America, Inc. ("Canonlat") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

This case concerns whether Respondent, Lantech (C.R.), S.A. ("Lantech"), a former distributor of Canon® brand products in Costa Rica, may be enjoined from pursuing a legal action in Costa Rica against Canonlat in violation of the forum selection clause in the parties' distribution agreement. The district court entered a preliminary anti-suit injunction on September 29, 2006, which is reported at 453 F. Supp. 2d 1357 (S.D. Fla. 2006) [App. C]. On July 18, 2007, the district court entered a permanent anti-suit injunction, which is reported at 497 F. Supp. 2d 1370 (S.D. Fla. 2007) [App. B]. The Eleventh Circuit's November 21, 2007 decision vacating the anti-suit injunction is reported at 508 F.3d 597 (11th Cir. 2007) [App. A].

## JURISDICTION

The court of appeals entered its judgment in the current proceeding on November 21, 2007. [App. at 1a]. Canonlat timely filed a petition for rehearing and rehearing *en banc* on December 11, 2007. The court of appeals denied Canonlat's rehearing petition on February 13, 2008 [*Id.* at 57a], but stayed the effect of its decision dissolving the foreign anti-suit injunction on February 22, 2008, pending the filing of this

petition. The Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Costa Rica's Public Law 6209, entitled "Representatives of Foreign Companies Act," states, in relevant part:[1]

> Article 2: (Recission of the agreement for reasons alien to the representative, distributor or manufacturer. Consequences). If the representation, or distribution or manufacturing agreement is rescinded for reasons beyond the control of the representative, distributor or manufacturer, or when the term of the agreement expires and it is not extended for reasons beyond the control of the same, the foreign company shall indemnify them with an amount calculated on the basis of the equivalent of four months of gross profits for each year or fraction of time passed. The value of the indemnity in no event shall be calculated for a period exceeding nine years of service.
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> ***
>
> Article 4: The following are deemed as just causes for the termination of the contract of

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[1] Respondent appended an English-only version of the text of Costa Rica's Public Law 6209 to its Initial Brief [A-1-A-5] before the Eleventh Circuit. The court of appeals, in turn, relied on certain portions of that text in its decision. [App. at 4a].

representation, distribution or manufacture, with liability for the foreign company: . . . e – The appointment of a new representative, distributor or manufacturer, when the affected parties have exercised the representation, distribution or manufacture on an exclusive basis.

***

Article 6: (Individual or corporation that partially or wholly assumes any business activity, which was performed previously by a foreign company through a representative, distributor or manufacturer. Liability). The individual or corporation that partially or wholly assumes any business activity which was previously conducted by a foreign company through a representative, distributor or manufacturer shall be responsible for the continuity of the representation, distribution or manufacturing agreement, unless the foreign company had previously covered the pertinent indemnity.

Article 7: The jurisdiction of the Costa Rican courts of justice and the rights of the representative, distributor, or manufacturer, by virtue of this law, cannot be waived.

## STATEMENT OF THE CASE

This case presents a direct conflict between the Eleventh, Ninth, and First Circuits over the threshold test a party must satisfy in order to obtain a foreign

anti-suit injunction. The initial test, as defined by each of these circuits, requires that the enjoining court determine, first, whether the parties and the claims in both the foreign and domestic litigation are the same, and second, whether the action before the enjoining court is dispositive of the action to be enjoined. Collapsing the "same claim" and "dispositive" prongs of the test, the Eleventh Circuit has held that "the interest of international comity and judicial restraint" require that the claims pending before the enjoining court be identical to those in the action to be enjoined so that the anti-suit injunction will "settle or finish the dispute." [App. at 8a]. In contrast, the Ninth Circuit, reviewing the denial of a foreign anti-suit injunction to enforce a forum selection clause, has ruled that the threshold test is satisfied where "all the issues" raised in the action to be enjoined are also before the enjoining court. The First Circuit, in turn, will consider issuing a foreign anti-suit injunction where the claims involved in the competing actions are "substantially similar."

By ignoring the parties' forum selection clause and focusing on a non-particularized concern over comity, the Eleventh Circuit inexplicably parted ways with the Court's well-established policy in favor of enforcing such clauses in international contracts. This national policy is so strong that even those circuits in disagreement over the weight to be given to comity in issuing foreign anti-suit injunctions have uniformly agreed that such injunctions are appropriate in order to enforce the forum chosen by the contracting

parties.[2] The Eleventh Circuit's ruling not only discounts this national policy, it ignores the practical realities underlying the shift from rejecting forum selection clauses to enforcing such agreements as *prima facie* valid.

The Eleventh Circuit's decision sets a dangerous precedent for U.S. businesses dealing in the global marketplace. Parties to international contracts attempt to minimize their legal risks by negotiating as many aspects of their agreements as possible. Concerns over the fairness of a particular forum's laws, in particular, often drive parties' decisions to negotiate and contract to litigate in a specific forum. These concerns also motivate parties' decisions to contract to arbitrate their disputes. Indeed, arbitration clauses are simply another form of forum selection clause. By ignoring the parties' agreement to bring all of their disputes in the courts of Florida, the Eleventh Circuit in this case has called into question the validity of such agreements to the detriment of U.S. businesses that have negotiated or may be in the midst of negotiating such agreements.

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[2] This is distinguished from the conflict which currently exists among the circuits as to the applicable legal standard to be applied in determining whether to issue an anti-suit injunction. That conflict is the subject of a pending petition for writ of certiorari in the case of *Goss Int'l Corp. v. Tokyo Kikai Seisakusho, et al*, Docket No. 07-618. However, because the Eleventh Circuit in this case resolved the case on the question of the threshold test, it never reached the issue of which of the applicable legal standards applied.

The Court's policy in favor of enforcing forum selection clauses remains critically important, as demonstrated by the facts here. Lantech and Canonlat enjoyed a business relationship for many years and negotiated an arms-length agreement including a forum selection clause under which Lantech agreed to bring any disputes in the courts of Florida. After their relationship soured, and contrary to the express terms of the parties' written agreement, Lantech sued Canonlat in Costa Rica for damages in excess of $6 million. In conjunction with its foreign lawsuit, Lantech procured from the Costa Rican court an *ex parte* order requiring that Canonlat post and maintain a $1 million bond or face a complete ban on the importation of its products into Costa Rica. For this reason, the district court found that the Costa Rican lawsuit was "vexatious." [App. at 28a, 49a-50a].

Under the Eleventh Circuit's "first to the courthouse" approach, parties will be able to avoid their contractual obligations by simply being the first to file suit, regardless of the forum selection clause. This approach, as the district court recognized, will undermine the Court's well-established policy of enforcing forum selection clauses. The Eleventh Circuit's approach will also hurt U.S. businesses that have attempted to limit their legal risks in the global marketplace by defining the specific location for the resolution of all disputes. This Court should settle the conflict among the circuits regarding the threshold showing parties to international contracts must make in order to obtain a foreign anti-suit injunction where such relief is necessary to enforce a forum selection clause.

### A. The Parties' Business Relationship

On December 18, 1996, Canonlat entered into an "Office Distribution Agreement" with Lantech. [App. 2a-3a, 13a]. This agreement was subsequently superseded by the "Canon Brand Product Distribution Agreement" on July 21, 2003. [*Id.* at 2a, 13a]. Both the 1996 and 2003 agreements contained a mandatory choice of forum clause requiring that any dispute, regardless of the legal theory, be litigated in the courts of Florida, pursuant to Florida law. [*Id.* at 2a-3a, 13a]. The forum selection clause specifically provided:

> THIS AGREEMENT IS MADE IN THE STATE OF FLORIDA AND SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF FLORIDA . . . .DISTRIBUTOR FURTHER AGREES THAT ALL SUITS COMMENCED BY DISTRIBUTOR AGAINST CANONLAT UPON ANY AND ALL CAUSES OF ACTION, WHETHER OR NOT SUCH CAUSES OF ACTION HAVE ARISEN UNDER THIS AGREEMENT AND REGARDLESS OF THE LEGAL THEORY UPON WHICH SUCH CAUSES OF ACTION ARE BASED, SHALL BE BROUGHT EXCLUSIVELY IN A STATE OR FEDERAL COURT SITUATED WITHIN THE STATE OF FLORIDA.

[*Id.* at 3a, 13a-14a]. Before the district court, Lantech conceded that the 1996 and 2003 agreements were negotiated at arms-length, and entered into by Lantech willfully and voluntarily. [*Id.* at 13a, 36a].

### B. Lantech Sues Canonlat In Costa Rica In Violation Of The Forum Selection Clause In The Parties' 2003 Distribution Agreement

In March 2004, Canonlat informed Lantech that it wanted to appoint SB Technology as an additional distributor in Costa Rica. [App. 3a, 15a, 38a]. Despite the fact that the 1996 and 2003 agreements reflected that Lantech was a non-exclusive distributor of Canon® brand products, Lantech objected. [App. at 2a, 13a, 36a]. By March 2004, Lantech owed Canonlat $247,653.20 for goods it had received from Canonlat. [*Id.* at 3a, 14a, 38a]. In November 2004, Lantech, without notifying Canonlat, sued Canonlat and SB Technology in Costa Rica for purportedly violating Costa Rica Public Law 6209, entitled "Representatives of Foreign Companies Act." [*Id.* at 4a, 15a, 38a]. In its lawsuit, Lantech sought damages in the amount of $6,303,366.89 on grounds that Canonlat unlawfully terminated Lantech as an "exclusive" distributor. [*Id.* at 4a, 15a, 38a].

The following month, at Lantech's request, a Costa Rican court issued an *ex parte* order requiring that Canonlat post a $1 million bond or discontinue importing goods into Costa Rica. [*Id.* at 4a, 16a, 39a]. When it learned of Lantech's Costa Rican lawsuit, Canonlat retained local counsel, posted the bond, and sought unsuccessfully to dismiss the Costa Rican action for lack of jurisdiction, based in part upon the mandatory forum selection clause. [*Id.* at 4a, 16a, 39a]. In March 2005, Canonlat formally notified Lantech that it was terminating the 2003 Agreement

for cause due to non-payment for goods. [*Id.* at 4a-5a, 16a, 38a-39a].

### C. Canonlat Petitions The District Court For An Anti-Suit Injunction

In February 2005, pursuant to the forum selection clause in the parties' 2003 Agreement, Canonlat sued Lantech in the Southern District of Florida for declaratory and injunctive relief. [App. at 5a, 16a-17a, 39a-40a]. Canonlat also sought a preliminary anti-suit injunction, prohibiting Lantech from prosecuting its lawsuit in Costa Rica. [*Id.* at 35a]. After an evidentiary hearing, the district court granted injunctive relief on the ground that Lantech's Costa Rican lawsuit "frustrates the policy of the United States courts of enforcing forum selection clauses" and is vexatious. [*Id.* at 49a].

The district court rejected Lantech's contention that Canonlat had not satisfied the threshold requirements for obtaining an anti-suit injunction. [*Id.* at 50a]. Because the parties were substantially the same and the basis for liability for the claims in both the U.S. and Costa Rican actions all arose from the distributorship relationship between the parties, the district court found that this threshold requirement was satisfied. [*Id.* at 50a-51a]. The district court dismissed Lantech's assertion that an injunction would deprive it of its rights under Costa Rica's Law 6209. "By freely entering into the Agreement which contained the choice of forum and law provisions," the district court explained "Lantech itself chose not to avail itself of the protection of litigating its action in a Costa Rica forum." [*Id.* at

53a]. Moreover, the district court found that Lantech failed to demonstrate that the district court could not apply Costa Rican law, were it to bring the Law 6209 claim as a counterclaim in the U.S. action. [*Id.* at 54a].

### D. The District Court Enters A Permanent Anti-Suit Injunction

On July 18, 2007, the district court granted Canonlat's motion for summary judgment and entered a permanent, foreign anti-suit injunction. [App. at 12a]. Reiterating those grounds relied upon in issuing provisional relief to Canonlat, the district court found that the parties and claims in both the U.S. and Costa Rican action were similar, and thus Canonlat had satisfied the threshold requirements for issuance of a foreign anti-suit injunction. [*Id.* at 29a-31a]. Rejecting Lantech's contention that the claims were not sufficiently similar because the U.S. action would "not dispose of the issues in the Costa Rican action pertaining to Public Law 6209," the district court explained that Lantech should have filed its Law 6209 claim as a counterclaim to Canonlat's lawsuit in the U.S. [*Id.* at 30a].

### E. The Eleventh Circuit Reverses The District Court's Injunction, Adding To The Conflict Between The Ninth And First Circuits

Finding that Lantech's suit in Costa Rica turned "on statutory rights that are unique to Costa Rica and that cannot be resolved by a judgment of the district court on Canonlat's claims in Florida," the Eleventh Circuit ruled that Canonlat could not establish the

threshold requirements for issuance of a foreign anti-suit injunction. [App. at 8a-9a]. Though it recognized that "[n]ot all circuits adhere strictly to the requirement that the action in the enjoining court be dispositive of the action to be enjoined or that the claims in both actions be the same," the Eleventh Circuit explained that "international comity and judicial restraint" required that it read "'dispositive' for what it means: to settle or finish the dispute." [*Id.*]. In so ruling, the court of appeals acknowledged a direct conflict with the Ninth Circuit's decision in *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984 (9th Cir. 2006), and the First Circuit's decision in *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004). [*Id.*].

Although it noted the existence of a forum selection clause in the parties' distribution agreement [*Id.* at 3a], the Eleventh Circuit gave no weight to that clause's requirement that Lantech bring any and all claims exclusively in the courts of Florida. Significantly, the court of appeals rejected the district court's determination that Lantech could have [and should have] brought its Law 6209 claim as a counterclaim in the U.S. action. [*Id.* at 9a]. Citing to Federal Rule of Civil Procedure 13, the Eleventh Circuit explained that "a counterclaim is not compulsory if 'at the time the action was commenced the claim was the subject of another pending action.'" [*Id.* at 9a]. Discounting entirely the forum selection clause and the fact that the Law 6209 claim should not have been filed in Costa Rica in the first place, the court of appeals reasoned that "Lantech's Law 6209 claim was the subject of the Costa Rican suit pending at the time that Canonlat brought its claims in the

district court. As such, it was not a compulsory counterclaim." [*Id.*].

## REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve the conflict among the circuits regarding the threshold standard parties must satisfy before obtaining a foreign anti-suit injunction, particularly in those cases where injunctive relief is necessary to enforce a forum selection clause.

A direct conflict exists between the Eleventh, Ninth, and First circuits over the threshold showing a party must make in order to obtain a foreign anti-suit injunction. The Eleventh Circuit held that Canonlat could not satisfy the threshold test because Lantech's action in Costa Rica hinged on a statutory claim not asserted in the U.S. action. [App. at 9a-10a]. Giving no weight to the parties' forum selection clause, the court of appeals rejected the district court's determination that Lantech should have brought its claim in the U.S. action by way of counterclaim. [*Id.* at 9a]. The Ninth Circuit, on facts nearly identical to those at issue here, reached the opposite conclusion, finding that the threshold test was satisfied where all of the issues raised in the foreign court were also before the enjoining court. *E. & J. Gallo Winery*, 446 F.3d at 991. In its analysis, the Ninth Circuit focused on the fact that the competing claims – though based on different legal theories – arose out of the parties' written agreement and involved the ultimate question of whether a breach occurred. *Id.* at 991. Significantly, the Ninth Circuit noted that "[w]ithout an anti-suit injunction in this case, the forum selection

clause effectively becomes a nullity" where "[t]he potential implications for international commerce are considerable." *Id.* at 993. In an approach similar to the Ninth Circuit, the First Circuit had held that the threshold test is satisfied upon a showing that the claims in both actions are "substantially similar." *Quaak*, 361 F.3d at 20.

The conflict among the circuits leaves open to question the continuing validity of forum selection clauses. Under the Eleventh Circuit's ruling, a party will be able to block an anti-suit injunction merely by drafting a claim for relief based on a statute or legal theory different than that pending in the enjoining court. Unlike the Ninth and First Circuits, the Eleventh Circuit's determination turns on little more than how the claim is packaged. Despite the fact that the claims in Costa Rica and the U.S. arose out of the parties' written distribution agreement and concerned the ultimate question of whether a breach occurred, Respondent won the day by characterizing its claim as one for damages under Public Law 6209 (as opposed to Petitioner's breach of contract claim in the U.S. action). In *Roby v. Corp. of Lloyd's,* 996 F.2d 1353, 1360 (2d Cir. 1993), the Second Circuit foreshadowed the problem with the Eleventh Circuit's view in this case, noting that "[i]t defies reason to suggest that [a party] may circumvent [a] forum selection . . . clause merely by stating claims under laws not recognized by the forum selected in the agreement." *See also E. & J. Gallo Winery v. Andina Licores, S.A.,* 440 F. Supp. 2d 1115, 1127 (E.D. Cal. 2006) (stating "that the forum or choice of law specified by a contract affords remedies that are different or less favorable to the laws of the forum preferred by a plaintiff is not alone a valid basis

to deny enforcement of the forum selection . . . provisions.").

The Eleventh Circuit's disregard for forum selection clauses will also have a significant impact on U.S. businesses in the global marketplace. Without the ability to enforce forum selection clauses, nothing will prevent businesses from engaging in bad-faith negotiations, extracting concessions from a U.S. business in exchange for a forum selection clause they know will not be enforceable. Unable to enforce these clauses, U.S. businesses will face the uncertainty and inconvenience of having to litigate in far-flung jurisdictions. This is exactly what the Court attempted to avoid when it wrote, more than thirty years ago, that "[t]he elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *The Bremen*, 407 U.S. at 13.

The resolution of the conflict between the Eleventh, Ninth, and First Circuits is critically important, especially to U.S. businesses engaged in international commerce. Not only does the Eleventh Circuit's decision add to a growing split among the circuits, but it also misapplies the Court's longstanding precedent on the enforceability of forum selection clauses.

### A. The Circuits Are In Conflict Over The Threshold Standards For Issuing Foreign Anti-Suit Injunctions

Vacating the anti-suit injunction in this case, the Eleventh Circuit acknowledged that "[n]ot all circuits

adhere strictly to the requirement that the action in the enjoining court be dispositive of the action to be enjoined or that the claims in both actions be the same." [App. at 8a]. The Eleventh Circuit acknowledged conflict with both the Ninth Circuit in *E & J Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984 (9th Cir. 2006), and the First Circuit in *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 21 (1st Cir. 2004).

In 1978, Gallo, a California-based winery, entered into a distributorship agreement with Andina, a wine and liquor distributor headquartered in Ecuador. *E & J Gallo Winery*, 446 F.3d at 987. Gallo and Andina executed an updated distributorship agreement in 1987. *Id.* Both the 1978 and 1987 agreements contained the same forum selection clause, which provided that "any cause of action arising between the parties, whether under this agreement or otherwise, shall be brought only in a court having jurisdiction and venue at the home office of Winery." *Id.*

In April and May 2004, Gallo and Andina exchanged a series of letters over disputes. *Id.* Several months later, Andina sued Gallo in Ecuador, alleging a violation of Decree 1038-A, a law purportedly intended to protect Ecuadorians who acted as agents, distributors, or representatives of foreign companies. *Id.* Like Costa Rica's Public Law 6209, Ecuador's Decree 1038-A contained a stiff damages provision. As part of its Ecuadorian lawsuit, Andina claimed $75,000,000 in damages. *Id.* at 988. Like Canonlat, Gallo also sought a preliminary, foreign anti-suit injunction in the U.S. court restraining Andina from pursuing its action in Ecuador. *Id.* The

district court denied the motion, *id.*, but the Ninth Circuit reversed.

Like Lantech in this case, Andina argued that Gallo could not satisfy the threshold requirements for a foreign anti-suit injunction because the claims in Ecuador were not the same as those in the U.S. action. *Id.* at 991. The Ninth Circuit rejected the district court's determination, noting that Andina sued for breach of contract in Ecuador, while in the district court, Gallo sought a declaration that it did not breach the distributorship agreement. *Id.* As such, the court of appeals explained, "all the issues before the court in the Ecuador action are before the court in the California action." *Id.* Stated differently, the claims in both actions stemmed from the parties' rights and responsibilities under the distributorship agreement, and both sought relief for an alleged breach of that agreement. The Ninth Circuit also rejected Andina's claim, likewise raised by Lantech in this case, that an anti-suit injunction would deprive it of its right to pursue relief under Ecuadorian law. *Id.* The court of appeals explained that those claims were potentially barred by the choice-of-law clause contained in the parties' contract. *Id.* Alternatively, the court continued, federal courts were capable of applying Ecuadorian law to Andina's claims. *Id.*

Adding to the conflict among the circuits, the First Circuit has held that the threshold test is satisfied where the parties and claims in both actions are "substantially similar." *Quaak*, 361 F.3d at 20. While the First Circuit in *Quaak* did not expand on the meaning of "substantially similar," it is clearly a more relaxed standard than the strict identity requirement

imposed by the Eleventh Circuit and is likely more akin to the "similar issues" standard set by the Ninth Circuit in *Gallo*. *Quaak* further exposes the lack of uniformity and confusion among the circuits regarding this important threshold test.

In dissolving the foreign anti-suit suit injunction in this case, the Eleventh Circuit ignored the parties' forum selection clause in deference to "comity." [App. at 8a]. Canonlat's attempt to enforce the forum selection clause by obtaining an anti-suit injunction, however, did not threaten comity. As the Ninth Circuit has explained, "[i]n a situation like this one, where private parties have previously agreed to litigate their disputes in a certain forum, one party's filing first in a different forum would not implicate comity at all." *Gallo*, 446 F.3d 984. The court reasoned that where a case does not involve a governmental party and is limited to the enforcement of contractual rights among private parties, there is no threat to comity. *Id.*

Ultimately, it is Lantech that "set the stage for a crisis of comity," *Quaak*, 361 F.3d at 20, by initiating the foreign litigation in contravention of the forum selection clause contained in its contract with Canonlat. The Ninth Circuit has ruled that an approach which, as here, allows a party to evade the enforcement of a forum selection clause by simply rushing to another forum and filing suit will "vitiate United States policy favoring the enforcement of forum selection clauses" and will "also have serious deleterious effects for international comity." *Gallo*, 446 F.3d at 994. That is the very same conclusion that

the district court here reached in granting Canonlat an anti-suit injunction. [App. at 28a, 49a].

In sharp contrast to the Eleventh Circuit's ruling approving of Lantech's foreign lawsuit so that it could pursue relief under Costa Rica Public Law 6209, federal courts have consistently held that U.S. litigants may not sidestep forum selection clauses in favor of foreign jurisdictions in order to pursue U.S. law-specific remedies. In *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992), the Tenth Circuit ruled that "[t]he fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement, provided that the law of the chosen forum is not inherently unfair." *Id.* at 958 (internal citations omitted). Four other circuits have similarly enforced forum selection and choice of law clauses against U.S. parties seeking to litigate in the U.S. *See Bonny v. Soc. of Lloyds*, 3 F.3d 156 (7th Cir. 1993); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Haynsworth v. The Corp.*, 121 F.3d 956 (5th Cir. 1997).

Ultimately, Lantech's decision to sue in Costa Rica is even harder to accept in light of the fact that it had the option, as the district court repeatedly recognized, to bring its claims against Canonlat in the U.S. [App. at 30a, 53a-54a; *See also Quaak,* 361 F.3d at 21 (explaining that KPMG-B's decision to initiate foreign litigation was "harder to accept" because it had the option to pursue relief in the district court.)].

The Eleventh Circuit erred in dissolving the anti-suit injunction on the basis of a non-particularized concern over comity and judicial restraint. By "genuflecting"[3] before the notion of comity, the Eleventh Circuit wholly disregarded the parties' contractual agreement and the significance of the forum selection clause. In doing so, the Eleventh Circuit forgot the Court's admonition that the enforcement of forum selection clauses "accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world." *The Bremen*, 407 U.S. at 11.

This Court should resolve the conflict between the Eleventh, Ninth, and First Circuits. The approach taken by the circuits reflects a clear divergence of opinion regarding the threshold elements that any litigant seeking a foreign anti-suit injunction must satisfy.

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[3] *See Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir.1996) ("We decline . . . to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action").

### B. The Eleventh Circuit's Wholesale Disregard Of The Forum Selection Clause Will Undermine This Court's Established Policy Of Enforcing International Agreements To Litigate Or Arbitrate In A Particular Forum

In *The Bremen,* a case involving an international towage contract between a U.S. and foreign party, the Court reversed the longstanding policy of many federal and state courts to decline enforcement of forum selection clauses. Adopting a national public policy in favor of enforcing such clauses, the Court explained that they were especially important given the "expansion overseas of commercial activities by business enterprises based in the United States." *The Bremen*, 407 U.S. at 8. Nearly three decades later, the Eleventh Circuit has "given far too little weight and effect," *id.*, if any, to the parties' forum selection clause based solely on a non-particularized concern over comity. No reasoned basis exists for departing from the Court's precedent.

*The Bremen* established the Court's broadly recognized doctrine that contractual forum selection clauses "are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *Id.* at 10. Since that holding, this Court has consistently upheld a policy in favor of enforcing contractual forum selection clauses. *See Scherk*, 417 U.S. 506 (enforcing agreement to arbitrate as a specialized kind of forum selection clause that specifies not only the location of the suit, but also the procedure to be used in resolving dispute); *Mitsubishi Motors Corp.*, 473 U.S. 614

(holding that anti-trust claim and allegation that agreement was tainted by fraud did not warrant refusal to enforce agreement to arbitrate in foreign forum); *Shute,* 499 U.S. 585 (enforcing forum selection clause in cruise passenger ticket contract based on adequate notice and despite possible hardship on passenger).

The policy underpinning the enforcement of forum selection clauses is consistent with the "expansion of overseas commercial activities by business enterprises based in the United States." *The Bremen*, 407 U.S. at 8. Such clauses have become "an indispensable element in international trade, commerce, and contracting" because they eliminate the uncertainties inherent in litigating in unknown fora. *Id.* at 13. As the Court explained shortly after deciding *The Bremen:*

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction . . .
>
> [A refusal to enforce a contractual forum selection provision] would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.... [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.

*Scherk,* 417 U.S. at 516-517.

Although *The Bremen*, *Scherk*, and *Mitsubishi Motors* all involved the enforcement of agreements to bring claims in overseas fora, the Court's reasoning in those decisions likewise favors enforcing agreements to litigate (or arbitrate) disputes in the U.S. by enjoining parties from "jockeying" to "secure tactical litigation advantages" in foreign jurisdictions. *Id.* With the exception of the Eleventh Circuit's decision, in every other reported federal case involving a request for a foreign anti-suit injunction to vindicate a contractual forum selection clause, the anti-suit injunction has been granted. *See, e.g., Gallo, supra*; *Int'l Equity Inv. Inc. v. Opportunity Equity Partners, Ltd.*, 441 F. Supp. 2d 552 (S.D.N.Y. 2006), *aff'd* 2007 WL 2492139 (2d Cir. Aug. 30, 2007); *Farrell Lines, Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118, 130 (S.D.N.Y. 1997), *aff'd*, 161 F.3d 115 (2d Cir. 1998); *Int'l Fashion Prods., B.V. v. Calvin Klein, Inc.*, 1995 WL 92321, *2 (S.D.N.Y. March 7, 1995); and *Suchodolski Assoc. Inc. v. Cardell Fin. Corp.*, 2006 WL 3327625, *2 (S.D.N.Y. Nov. 16, 2006) (finding dispositive case threshold prong met under *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 652 (2d Cir. 2004), where issues were "substantially the same" and injunction was appropriate to prevent simultaneous litigation in contravention of the bargained-for forum selection clause); *Smith / Enron Cogeneration Ltd, P'ship, Inc. v. Smith Cogeneration Int'l., Inc.*, 198 F.3d 88, 99 (2d Cir. 1999).

The Eleventh Circuit's narrow construction of the "same claim" threshold requirement threatens to render the Court's well-established line of authority favoring forum selection clause enforcement in

international disputes all but irrelevant. Moreover, with other circuits deciding the "same claim" threshold matter more broadly (and in a manner more harmonious with *The Bremen, Scherk, Mitsubishi,* and *Shute*), there is an absolute need to resolve this conflict if the Court's oft-stated goal of creating predictability in international business dealings is to be upheld.

## CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2008

# APPENDIX

## APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

**No. 07-13571**
**D. C. Docket No. 05-20297-CV-MGC**

**[Filed November 21, 2007]**

| | |
|---|---|
| CANON LATIN AMERICA, INC., | ) |
| | ) |
| Plaintiff-Appellee, | ) |
| | ) |
| versus | ) |
| | ) |
| LANTECH (CR), S.A., | ) |
| | ) |
| Defendant-Appellant. | ) |
| | ) |

Appeal from the United States District Court
for the Southern District of Florida

**(November 21, 2007)**

Before EDMONDSON, Chief Judge, DUBINA, Circuit Judge, and MARTIN,* District Judge.

PER CURIAM:

This case raises a question about the district court's authority to enjoin the parties before it from proceeding with litigation in a foreign court. Defendant- Appellant Lantech (C.R.), S.A. ("Lantech") appeals the district court's decision to grant a permanent injunction barring Lantech from proceeding with its claims in Costa Rica against Plaintiff-Appellee Canon Latin America, Inc. ("Canonlat"). For the reasons that follow, we vacate the injunction and remand the case for dismissal of Canonlat's outstanding claims.

## I. Background

In 1996, Canonlat, a Florida corporation headquartered in Miami, entered into an agreement with Lantech, a Costa Rican corporation, to distribute Canon brand products in Costa Rica. In 2003, the parties entered into a superseding distribution agreement ("the Agreement"). Under the Agreement, Canonlat appointed Lantech "as a non-exclusive authorized distributor of the CANON® brand products" for the territory of Costa Rica. The Agreement also included a forum selection and choice

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* Honorable Beverly B. Martin, United States District Judge for the Northern District of Georgia, sitting by designation.

of law clause in favor of Florida.[1] The parties negotiated the original and superseding agreements at arm's length and entered into both agreements voluntarily.

In March 2004, Canonlat notified Lantech that it was seeking to appoint an additional distributor. The following month, over Lantech's objections, Canonlat appointed Santa Barbara Technology, S.A. ("SB Technology") as an additional distributor beginning in July 2004. At the time of SB Technology's appointment, Lantech had fallen behind on its payments and owed Canonlat $247,653.20.

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[1] The Agreement states in relevant part:

THIS AGREEMENT IS MADE WITHIN THE STATE OF FLORIDA AND SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF FLORIDA. . . . IN THE EVENT OF ANY LITIGATION BETWEEN THE PARTIES, DISTRIBUTOR CONSENTS TO THE JURISDICTION AND VENUE OF THE STATE AND FEDERAL COURTS SITUATED WITHIN THE STATE OF FLORIDA UPON SERVICE OF PROCESS MADE IN ACCORDANCE WITH THE STATUTES OF FLORIDA AND THE UNITED STATES, RESPECTIVELY. DISTRIBUTOR FURTHER AGREES THAT ALL SUITS COMMENCED BY DISTRIBUTOR AGAINST CANONLAT UPON ANY AND ALL CAUSES OF ACTION, WHETHER OR NOT SUCH CAUSES OF ACTION HAVE ARISEN UNDER THIS AGREEMENT AND REGARDLESS OF THE LEGAL THEORY UPON WHICH SUCH CAUSES OF ACTION ARE BASED, SHALL BE BROUGHT EXCLUSIVELY IN A STATE OR FEDERAL COURT SITUATED WITHIN THE STATE OF FLORIDA.

In November 2004, without informing Canonlat, Lantech filed suit in Costa Rica against Canonlat and SB Technology for violating Costa Rica Public Law 6209 ("Law 6209"), entitled "Representatives of Foreign Companies Act." Lantech sought indemnity in excess of $6 million on grounds that Canonlat unlawfully terminated Lantech as an "exclusive" distributor.[2] In December 2004, without prior notice to Canonlat, a Costa Rican court required Canonlat to post a $1 million bond or discontinue importing goods to Costa Rica. After SB Technology informed Canonlat of the lawsuit in January 2005, Canonlat posted the bond and sought unsuccessfully to dismiss the Costa Rican action for lack of jurisdiction.[3] Later, in March

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[2] The relevant provisions of Law 6209 state:

Article 2: If the representation, distribution or manufacturing contract is terminated due to causes not related to the will of the representative, the distributor or the manufacturer . . . the foreign company must indemnify them . . . .

* * *

Article 4: The following are deemed as just causes for the termination of the contract of representation, distribution or manufacture, with liability for the foreign company: . . . e – The appointment of a new representative, distributor or manufacturer, when the affected parties have exercised the representation, distribution or manufacture on an exclusive basis.

Here, we use the translation provided to us in the appendix to Lantech's brief.

[3] In May 2005, the Costa Rican court rejected Canonlat's jurisdictional challenge on grounds that the Agreement's forum

2005, Canonlat formally notified Lantech by letter that the Agreement was terminated for non-payment of goods.

After learning of the Costa Rican action, Canonlat filed this suit in February 2005 against Lantech in the Southern District of Florida for declaratory and injunctive relief, seeking to bar Lantech from proceeding with its suit in Costa Rica.[4] The district court granted the requested permanent anti-suit injunction.[5] In reaching its decision, the district court

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selection clause "is of no effect, since a public policy law such as 6209 specifies that the jurisdiction of the courts of this country cannot be waived in this type of dispute." A three-judge appellate panel affirmed in August 2005. The relevant anti-waiver provision of Law 6209 is Article 7, which states: "The jurisdiction of the Costa Rican courts of justice and the rights of the representative, distributor or manufacturer, by virtue of this law, cannot be waived."

[4] Count I of Canonlat's amended complaint filed in May 2005 sought a declaratory judgment that the forum selection and choice of law provisions, as well as the non-exclusivity provisions, of the Agreement were valid and enforceable. Under Count II, Canonlat sought an injunction barring Lantech from maintaining its lawsuit in Costa Rica. Counts III through VI involved breach of contract as well as quasi-contract claims against Lantech for failure to pay its outstanding debt. Lantech agreed in March 2007 to a final judgment on Count III for breach of contract, and the parties stipulated to the dismissal of Counts IV, V, and VI. Thus, the only outstanding claims on appeal are Counts I and II.

[5] In September 2006, the district court issued a preliminary injunction effective until it determined whether the forum selection and choice of law clause was valid and enforceable. As a

rejected Lantech's argument that the parties in the two actions were not identical[6] and that the action in the enjoining court was not similar to or dispositive of the action in the foreign court. The district court concluded instead that the parties and claims were sufficiently similar to meet the threshold requirements for issuing an anti-suit injunction.[7] Lantech now appeals the district court's order.

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result of the preliminary injunction, Lantech moved to temporarily suspend the Costa Rican proceedings and then filed an interlocutory appeal in this court, which has since been dismissed as moot. The Costa Rican court agreed to an initial six-month stay, and then, in April 2007, it issued a final six-month stay that Lantech says will expire on 29 November 2007. In July 2007, the district court granted the permanent injunction that is the subject of this appeal, adopting its earlier ruling on the preliminary injunction.

[6] The Costa Rican action includes the additional distributor, SB Technology, but the United States action does not.

[7] On Canonlat's Count I claims for declaratory judgment, the district court granted partial summary judgment to Canonlat, declaring that the Florida forum selection clause was valid and enforceable, notwithstanding Lantech's argument that the express anti-waiver provision in Law 6209 represents Costa Rica's strong public policy in litigating claims under Law 6209 only in Costa Rican courts. But the district court did not grant summary judgment to Canonlat on its remaining declaratory judgment claims involving the validity and enforceability of the choice of law provisions as well as the validity and enforceability of the non-exclusivity provisions.

## II. Standard of Review

A district court's decision to grant a permanent anti-suit injunction is reviewed for abuse of discretion. *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 651 (2d Cir. 2004); *see SunAmerica Corp. v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325, 1333 (11th Cir. 1996) ("We review the district court's grant of injunctive relief for abuse of discretion . . . ."). But even under this standard, we review *de novo* a district court's interpretation of "[u]nderlying questions of law." *Major League Baseball v. Crist*, 331 F.3d 1177, 1183 (11th Cir. 2003).

## III. Discussion

It is well-established among the courts of appeals that federal courts have some power to enjoin foreign suits by persons subject to federal court jurisdiction. *See, e.g., Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 16 (1st Cir. 2004); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987). Lantech challenges the injunction at issue here, however, on grounds that the threshold requirements for issuing an anti-suit injunction are not satisfied. Because we agree with Lantech that this case does not meet at least one of the threshold requirements, we vacate the injunction.

As an initial matter, a district court may issue an anti-suit injunction only if: (1) "the parties are the same in both [the foreign and domestic lawsuits]," and (2) "resolution of the case before the enjoining court is

dispositive of the action to be enjoined."[8] *Paramedics*, 369 F.3d at 652; *see also E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 991 (9th Cir. 2006). Once these threshold requirements are satisfied, courts must then consider additional factors to determine whether an injunction is appropriate. *Paramedics*, 369 F.3d at 652; *see also Quaak*, 361 F.3d at 18 (noting that only if the "gatekeeping inquiry" is met "should the court proceed to consider all the facts and circumstances in order to decide whether an injunction is proper"); George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 Colum. J. Transnat'l L. 589, 626 (1990) (observing that "courts will not consider issuing anti-suit injunctions unless in fact there are (or could be) parallel local and foreign actions between the same parties over the same claim").

Lantech contends that the claims in the district court are not dispositive of the claim in the Costa Rican court because the actions involve different substantive issues. For instance, the only substantive issue in the Costa Rican action is a claim arising from Law 6209 for unlawful termination of an exclusive

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[8] Not all circuits adhere strictly to the requirement that the action in the enjoining court be dispositive of the action to be enjoined or that the claims in both actions be the same. *See, e.g.*, *Gallo*, 446 F.3d at 991 (treating a claim under an Ecuadorian decree the same as a claim for breach of contract); *Quaak*, 361 F.3d at 20 (concluding that the threshold inquiry is satisfied because the parties and the claims are "substantially similar"). In the interest of international comity and judicial restraint, however, we choose to read "dispositive" for what it means: to settle or finish the dispute.

distributorship. No claim under Law 6209 is before the district court. Instead, the only substantive issues before the district court are common law contract and quasi-contract claims for non-payment of goods.

Canonlat argues that the two actions share similar claims because they both seek a declaration about whether the Agreement's forum selection and choice of law clause is valid and enforceable, a declaration about whether Lantech was an exclusive distributor, and a declaration about monetary damages, including whether Lantech owed Canonlat an outstanding debt for goods sold and delivered. Canonlat also agrees with the district court that the two actions are sufficiently similar because Lantech's Costa Rican complaint "'is replete with references to the Agreement,'" which puts the effect and enforceability of the Agreement at issue in both the district court and Costa Rican actions.

Lantech's Costa Rican action hinges on statutory rights that are unique to Costa Rica and that cannot be resolved by a judgment of the district court on Canonlat's claims in Florida.[9] As a result, the district court erred in granting the permanent anti-suit

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[9] That Lantech could have brought its Law 6209 claim in the district court by way of counterclaim is unimportant because it was under no obligation to do so pursuant to the Federal Rules of Civil Procedure. According to Rule 13, a counterclaim is not compulsory if "at the time the action was commenced the claim was the subject of another pending action." Fed. R. Civ. P. 13(a)(1). Here, Lantech's Law 6209 claim was the subject of the Costa Rican suit pending at the time that Canonlat brought its claims in the district court. As such, it was not a compulsory counterclaim.

injunction against Lantech. *See, e.g.*, *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 366 (8th Cir. 2007) (declining to intervene in foreign litigation where the plaintiff "seeks to litigate in Japan a cause of action solely available in Japan and not previously litigated in the [recently concluded U.S. action]"); *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 579 (1st Cir. 1969) (vacating an international anti-suit injunction "where the subject matter of the foreign suit is a separate, independent foreign patent right"); *Sperry Rand Corp. v. Sunbeam Corp.*, 285 F.2d 542, 545 (7th Cir. 1960) (vacating the injunction because "disposition of the cause pending in the District Court [would not] dispose of the German case or other threatened cases in foreign courts," which "involv[ed] specific foreign rights arising under and enforceable only through the laws of those foreign countries").

## IV. Conclusion

While we agree with Canonlat that the two actions are somewhat similar, Canonlat has not shown that the resolution of its claims in the district court would actually dispose of Lantech's claim in Costa Rica. The district court conceded as much in its discussion of the issue but concluded nevertheless that the cases were "sufficiently similar" to justify an anti-suit injunction because "the effect and enforceability of the Agreement [were] placed directly at issue in the Costa Rican action." Whether or not the cases are similar is not the legal standard, however. On the contrary, the standard, even according to *Gallo* upon which the district court mostly relied, is "whether or not the first action is *dispositive* of the action to be enjoined." *Gallo*,

446 F.3d at 991 (internal quotation marks omitted) (emphasis added). That the district court regarded the "dispositive" requirement as merely an "additional factor" in some courts, and not as a prerequisite, is therefore legal error that constitutes an abuse of discretion. Because we conclude that the second threshold requirement is not satisfied, the permanent injunction is improper.[10] Accordingly, we vacate the injunction and remand the case for dismissal of Counts I and II in accordance with this opinion.

**VACATE and REMAND.**

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[10] Lantech challenges the district court's decision granting declaratory judgment on the validity and enforceability of the forum selection clause only to the extent that such a declaration would weigh in favor of the injunction. Because the anti-suit injunction is in error for reasons separate and apart from the actual validity and enforceability of the forum selection clause, we agree with Lantech that the dispute on appeal over Canonlat's Count I declaratory action is moot.

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**Case No. 05-20297-CIV-BROWN**

**[Filed July 18, 2007]**

| | |
|---|---|
| CANON LATIN AMERICA, INC., | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| vs. | ) |
| | ) |
| LANTECH (CR), S. A., | ) |
| | ) |
| Defendant. | ) |
| | ) |

**ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

**This matter** is before the Court on Plaintiff Canonlat's Motion for Summary Judgment (DE 206) and Defendant Lantech's Motion for Summary Judgment (DE 246). The Court has reviewed the Motions, Responses, Replies, and all pertinent portions of the file. In addition, a hearing was held on June 28, 2007 and the Court adopts the transcript of that hearing by reference herein.

## FACTS

In 1996, Canon Latin America ("Canonlat"), a Florida corporation headquartered in Miami, Florida, entered into a distributorship agreement with Lantech (CR), S.A. ("Lantech"), a Costa Rican corporation. In 2003, the parties entered into a superseding distribution agreement ("the Agreement"). Both the original and superseding agreements were negotiated at arms-length, and entered into voluntarily.

The Agreement contains two paragraphs which pertain to Lantech acting as "a non-exclusive authorized distributor." Agreement ¶¶ 1.1, 2.4. Additionally, Paragraph Nineteen (19) of the Agreement, the "Choice of Law and Forum" clause, states, inter alia, as follows:

19. CHOICE OF LAW AND FORUM

**THIS AGREEMENT IS MADE WITHIN THE STATE OF FLORIDA AND SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF FLORIDA.** IF A DISPUTE ARISES AS A RESULT OF THE TERMINATION OF THIS AGREEMENT PURSUANT TO PARAGRAPHS 11 OR 15.3 ABOVE, AND IF SUCH DISPUTE CANNOT BE SETTLED THROUGH NEGOTIATION, THE PARTIES AGREE FIRST TO ATTEMPT IN GOOD FAITH TO RESOLVE THE DISPUTE BY MEDIATION IN MIAMI, FLORIDA, ... **IN THE EVENT OF ANY LITIGATION BETWEEN THE PARTIES,**

**DISTRIBUTOR CONSENTS TO THE JURISDICTION AND VENUE OF THE STATE AND FEDERAL COURTS SITUATED WITHIN THE STATE OF FLORIDA UPON SERVICE OF PROCESS MADE IN ACCORDANCE WITH THE STATUTES OF FLORIDA AND THE UNITED STATES, RESPECTIVELY. DISTRIBUTOR FURTHER AGREES THAT ALL SUITS COMMENCED BY DISTRIBUTOR AGAINST CANONLAT UPON ANY AND ALL CAUSES OF ACTION, WHETHER OR NOT SUCH CAUSES OF ACTION HAVE ARISEN UNDER THIS AGREEMENT AND REGARDLESS OF THE LEGAL THEORY UPON WHICH SUCH CAUSES OF ACTION ARE BASED, SHALL BE BROUGHT EXCLUSIVELY IN A STATE OR FEDERAL COURT SITUATED WITHIN THE STATE OF FLORIDA. * * *** Agmt. ¶19. (emphasis added).[1]

In 2003 and 2004, Lantech became delinquent on its account with Canonlat in the amount of $247,000.

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[1] It appears that in a related Costa Rica proceeding, discussed infra, Lantech submitted a version of the Agreement that contained certain language which differs from the version of the Agreement submitted to this Court. *See* Canonlat's Statement of Uncontroverted Facts and Response to the Declaration of R. van der Putten p. 2-3. This Court bases its ruling on the version of the documents which the parties have represented in this proceeding to be correct.

In or about March, 2004, Canonlat hired a new distributor, Santa Barbara Technology, S.A. ("SB Technology"), and notified Lantech.

On November 11, 2004, Lantech filed an action against Canonlat in Costa Rica seeking indemnity from Canonlat as well as SB Technology, claiming damages in the amount of $6,303,366.89, under Costa Rica Law No.6209, entitled Representatives of Foreign Companies Act (hereinafter "Law 6209").[2] Canonlat

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[2] The pertinent portions of that law state as follows:

> **Article 2. - (Recission of the agreement for reasons alien to the representative, distributor or manufacturer. Consequences).** If the representation, or distribution or manufacturing agreement is rescinded for reasons beyond the control of the representative, distributor or manufacturer, or when the term of the agreement expires and it is not extended for reasons beyond the control of the same, the foreign company shall indemnify them with an amount calculated on the basis of the equivalent of four months of gross profits for each year or fraction of time passed. The value of the indemnity in no event shall be calculated for a period exceeding nine years of service. ...
>
> * * *
>
> **Article 6. - (Individual or corporation that partially or wholly assumes any business activity, which was performed previously by a foreign company through a representative, distributor or manufacturer. Liability).** The individual or corporation that partially or wholly assumes any business activity which was previously conducted by a foreign company through a representative, distributor or manufacturer shall be responsible for the continuity of the

did not learn of the suit until it was advised of same in January, 2005 by S.B. Technology. Canonlat maintains that it did not terminate its relationship with Lantech until it was unable to collect the delinquent payment.

On December 14, 2004, without prior notice to Canonlat, the Costa Rican court required Canonlat to post a one-million-dollar bond ($1,000,000.00) or discontinue importing goods to Costa Rica. After being informed of the lawsuit in January, 2005, Canonlat posted the bond, retained an attorney in Costa Rica and unsuccessfully tried to have the case moved to the United States.

On February 1, 2005, Canonlat filed in this Court, pursuant to the Agreement, an initial complaint for declaratory and injunctive relief. On May 11, 2005, Canonlat filed a six (6) count Amended Complaint seeking/alleging: a declaratory judgment as to the choice of law and forum provision of the Agreement (Count I); an injunction enjoining the parties from litigating in Costa Rica (Count II); breach of contract, alleging that Lantech failed to pay Canonlat for its products in Florida (Count III); open account (Count

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representation, distribution or manufacturing agreement, unless the foreign company had previously covered the pertinent indemnity.

Once again, the Court notes a difference in wording in the above version of Article 6, as it is plead in the Costa Rica complaint (*See* CR Compl. p. 21, ¶ Tenth) and that which is attached as an exhibit to Lantech's Motion for Summary Judgment. *See* van der Putten Decl. Ex. A.

IV); "account stated," seeking back costs (Count V) and unjust enrichment, seeking damages (Count VI).

On August 17, 2006, Lantech filed its Answer to the Amended Complaint and Affirmative Defenses, asserting the following two affirmative defenses:

> (1) Canonlat's claims are barred because it has unclean hands in violating Costa Rica law, which actions are the subject of litigation brought in Costa Rica.
>
> (2) Canonlat is equitably estopped from pursuing its claims by virtue of its conduct which is the subject of the litigation in Costa Rica.

On July 6, 2006, Canonlat filed a Second Renewed Motion for Preliminary Injunction, which was heard by this Court on August 8, 2006. On September 27, 2006, this Court entered an Order Granting Second Renewed Motion for Preliminary Injunction ("Order"), in which the Court enjoined Lantech from taking any action in furtherance of the Costa Rica proceeding until the time this Court determines whether the Agreement's choice of law and forum selection provisions are valid and enforceable. Lantech has filed an appeal of that Order.

On October 20, 2006, Lantech requested the Costa Rica court to suspend the Costa Rica proceeding. On December 14, 2006, the Costa Rica court suspended the case for six months, and on April 19, 2007, the court continued that suspension for an additional six months.

On March 5, 2007, the Court entered an Agreed Final Judgment on Count III.[3]

## DISCUSSION

In the two remaining counts of the Amended Complaint, Canonlat seeks a declaratory judgment that the choice of law, forum selection and non-exclusivity clauses of the Agreement are enforceable (Count I); and a permanent injunction enjoining the Costa Rica litigation (Count II). Canonlat moves for summary judgment as to both counts, as well as Lantech's two affirmative defenses. Lantech agrees that there is no issue of material fact as to Count I, but argues that the choice of law and forum clauses of the Agreement are not enforceable and additionally argues that there are issues of fact which preclude summary judgment as to Count II.

### I. Count I - Declaratory Judgment

#### A. Forum Selection Clause

In its prior Order, this Court specifically recognized that although federal courts regard forum selection clauses (hereinafter "FSC") as presumptively valid, that presumption can be overcome "by a clear showing that the clauses are 'unreasonable under the circumstances.'" *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1362-63 (2d Cir. 1993) (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972)). This

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[3] The parties stipulated to the dismissal of Counts IV, V, and VI. (DE 222).

can be demonstrated when "(1) their formation was induced by fraud or overreaching; (2) the plaintiff effectively would be deprived of its day in court because of the inconvenience or unfairness of the chosen forum; (3) the fundamental unfairness of the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of such provisions would contravene a strong public policy." *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1295 (11th Cir. 1993) (noting that forum-selection and choice-of-law clauses are "presumptively valid where the underlying transaction is fundamentally international in character.")[4]

Lantech argues that the FSC should not be upheld based on Article 7 of Law 6209, which states:

> Article 7: The jurisdiction of the Costa Rican courts of justice and the rights of the representative, distributor or manufacturer, by virtue of this law, cannot be waived.

Lantech did not specifically argue the applicability of this Article, nor the affect thereof, in its papers or in the hearing concerning the Second Renewed Motion for Preliminary Injunction. Rather, it appears that the first time Article 7 was specifically referenced is in Lantech's Memorandum of Law in Opposition to Plaintiffs Motion for Summary Judgment, filed February 26, 2007. Lantech maintained at the hearing that it did not raise Article 7 previously because Law

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[4] Florida courts also follow the *Bremen* analysis. *Manrique v. Fabri*, 493 So. 2d 437 (Fla. 1986).

6209 was not part of this lawsuit. This position is rejected, in that although Lantech had not brought a claim for violation of Law 6209 in this Court, the existence of that law was critical in this Court's analysis of whether a preliminary anti-suit injunction should be granted.

Canonlat initially argues that by failing to raise Article 7 as an affirmative defense, Lantech has waived its ability to rely on it. The Court finds merit in this argument. *See* Fed.R.Civ.P. 12(h).[5] Although waiver would not apply if Article 7 deprived this Court of subject matter jurisdiction, it is significant that in the anti-waiver cases referenced by the parties the issue of lack of subject matter jurisdiction is not discussed. For example, Lantech relies heavily on *Jones v. GNC Franchising, Inc.*, 211 F.3d 495 (9th Cir. 2000), where the Court dealt with a statute that provided that "[a] provision in a franchise agreement restricting venue to a forum outside this state [California] is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state." *Id.* at 497 (quoting Cal. bus. & Prof Code §20040.5 (West 1997)). Although the court ultimately refused, on public policy grounds, to transfer the case to Pennsylvania based on a contractual FSC, there was

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[5] **(h) Waiver of Preservation of Certain Defenses.**

(1) A defense of ... improper venue ... is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

no discussion by the court that a Pennsylvania court would not have jurisdiction over such claims, only that venue would not be appropriate.

Similarly, there was no discussion of lack of subject matter jurisdiction in cases concerning claims brought pursuant to Puerto Rico Act No. 75 of 1964.[6] *See D.I.P.R. Mfg., Inc. v. Perry Ellis Intern., Inc.*, 472 F. Supp. 2d 151 (D. Puerto Rico 2007); *Maxon Engineering Svc., Inc. v. United Sciences, Inc.*, 34 F. Supp. 2d 97 (D. Puerto Rico 1998) (transferring case to Pennsylvania District Court); *Arrogar Distributors, Inc. v. KIS Corp.*, 151 F.R.D. 221 (D. Puerto Rico 1993); *see also E.&J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 987, 991 (9th Cir. 2006)(discussing Ecuador Decree 1038-A (repealed), which provided that "any legal action brought under the law was to be heard by a judge at the Ecuadorian company's main residence," finding that "to the degree that Ecuadorian law does apply, federal courts are capable of applying it ... " (citing Fed.R.Civ.P. 44.1)); *Elgin Sweeper Co. v. Melson, Inc*, 884 F. Supp. 641, 647 (N.D.N.Y. 1995) (stating that in an action based on diversity of

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[6] Section 278b-2 of the Act states, *inter alia*, that "[a]ny stipulation that obligates a dealer to adjust, arbitrate or litigate any controversy that comes up regarding his dealer's contract outside of Puerto Rico, or under foreign law or rule of law, shall be likewise considered as violating the public policy set forth by this chapter and is therefore null and void." *D.I.P.R. Mfg,. Inc. v. Perry Ellis Intern., Inc*, 472 F. Supp. 2d 151, 155 n. 5 (D. Puerto Rico 2007). Section 278c provides that" [t]he provisions of this chapter are of a public order and therefore the rights determined by such provisions cannot be waived." *Arrogar Distributors, Inc. v. KIS Corp.*, 151 F.R.D. 221, 227 (D. Puerto Rico 1993).

citizenship," application of controlling foreign law would not divest this court of subject matter jurisdiction.")

Lantech itself does not refer to Article 7 in jurisdictional terms, but rather refers to it as an "express *venue* mandate" (Reply p. 5)(emphasis added). Venue is an affirmative defense, which if not raised in the initial responsive pleading, is deemed waived. *See* Fed.R.Civ.P. 12(h).[7] Accordingly, this Court finds that Lantech's argument concerning Article 7 is one of improper venue, which has been waived. This also dispenses with Lantech's argument that this Court should not enforce the FSC under *Bremen* because it will be "deprive[d] of a remedy."[8]

Lantech additionally argues that the Court should not enforce the FSC because to do so would violate Costa Rica's "strong public policy in favor of litigating the [Law 6209] claim within its borders . . . ." Reply p. 3. This argument is also rejected. In *Bremen*, the Court

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[7] Lantech has submitted the Declaration of Robert van der Putten, one of its attorneys who is licensed to practice in Costa Rica, who states that "Costa Rica maintains exclusive jurisdiction over Public Law 6209 claims." van der Putten Decl, ¶11. To the extent that this statement suggests that this Court would not have subject matter jurisdiction over a Law 6209 claim, the only authority cited for this position is from the courts handling the Costa Rica proceeding brought by Lantech. Respectfully, this Court is not bound by the pronouncements of that court, but rather by federal precedent.

[8] At no time during the pendency of this case did Lantech seek to bring its Law 6209 claim in this Court.

stated that a court should not enforce a FSC if doing so would be against the public policy of *"the forum in which the suit is brought*, whether declared by statute or by judicial decision" 407 U.S. at 15 (emphasis added). This Court finds some merit in Lantech's argument that this statement was made due to the "reverse" procedural position of the parties in *Bremen* and subsequent cases where the action was filed by the party who was challenging enforcement of the clause. However, even if this Court were to consider the public policy of Costa Rica in addition to that of this forum to uphold FSCs, Lantech's argument would still fail. *See E. & J. Gallo Winery v. Andina Licores, S.A.*, 440 F. Supp. 2d 1115 (E.D. Cal. 2006).

As Canonlat notes, many of the cases cited by Lantech either do not pertain to international agreements, precede *Bremen* or have been overruled by subsequent case law. However, two of the cases deserve discussion because they contain venue anti-waiver clauses - *Jones*, *supra*, and *E & J Gallo Winery v. Morand Bros. Beverage Co.*, 247 F. Supp.2d 973 (N.D. Ill 2002).

In *Jones*, a case removed to the California District Court, the Ninth Circuit Court of Appeal recognized that "strong public policy may be 'declared by statute.'" 211 F.3d at 498 (quoting *Bremen*, 407 U.S. 15). In performing the *Bremen* analysis, the court stated:

> By voiding any clause in a franchise agreement limiting venue to a non-California forum for claims arising under or relating to a franchise located in the state, § 20040.5 ensures that California franchisees may litigate disputes

> regarding their franchise agreement in California courts. [footnote omitted] We conclude and hold that § 20040.5 expresses a strong public policy of the State of California to protect California franchisees from the expense, inconvenience, and possible prejudice of litigating in a non-California venue. A provision, therefore, that requires a California franchisee to resolve claims related to the franchise agreement in a non-California court directly contravenes this strong public policy and is unenforceable under the directives of Bremen.

*Id.* at 498.

In *E & J Gallo Winery*, the court invalidated a forum selection clause designating California as contrary to Illinois public policy that agreements governed by the Illinois Beer Act be brought in Illinois. The Court stated that "it is clear that the Illinois Beer Act embodies Illinois' strong public policy in favor of having these issues litigated within its borders," and that "[a]llowing a privately contracted forum selection clause to supersede the Beer Act and its policies would frustrate the intention of the statute." *Id.* at 977-98.

Canonlat correctly distinguishes these cases by noting that the contracts there were not of "international character." Moreover, the record in the case before this Court is lacking as to proof that litigating Article 2 claims in Costa Rica represents Costa Rica's public policy. Lantech does present the Declaration of Costa Rican attorney Claudio Murillo, Esq., who states that "[t]he Republic of Costa Rica

promulgated Public Law 6209 in order to protect Costa Rican companies who distribute the products of foreign manufacturers" (Murillo Decl. 79). However, there has been no showing that this Court cannot enforce this policy. Rather, the "policy" that Lantech argues will be violated by enforcement of FSC is the *venue* of Law 6209 claims.

With respect to the venue of Article 2 claims, recent developments in Costa Rica suggest that if Article 2 did at one time declare the public policy of Costa Rica, it no longer does. Canonlat notes that in August, 2004 (three months before Lantech filed its Costa Rica action), the United States and Costa Rica entered into the Dominican Republic-Central American Free Trade Agreement ("CAFTA-DR). Under the terms of Annex 11.13 of the Agreement, the government of Costa Rica has agreed to "repeal articles 2 and 9 of Law 6209, ... and its regulation ...," and to "enact a new legal regime that shall become applicable to contracts of ... distribution ... and: . . . (c) shall treat such contracts as establishing an exclusive relationship only if the contract explicitly states that the relationship is exclusive." *See* Canonlat Reply, Ex. 1; *see also* text at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA-DR. Additionally, under the new regime, distribution contracts will be presumed to be subject to arbitration, which "may," not "must," take place in Costa Rica. *Id.* Although Costa Rica has not yet ratified the Agreement, the signing of CAFTA diminishes Lantech's argument that the public policy of Costa Rica requires litigation of Article 2 claims by a Costa Rica court.

Therefore, the Court finds that when weighing the "public policy" of Costa Rica with respect to Law 6209 Article 2 claims against the presumption of validity of forum selection clauses, the FSC in the Agreement is valid and enforceable and summary judgment will be granted in favor of Canonlat on this issue.

B. Choice of Law Clause

In the Amended Complaint, Canonlat alleges that "the Agreement establishes that *all* litigation shall be in Florida in accordance with Florida law." Am. Cmplt. 11 (emphasis in original). In its Response to Lantech's Cross Motion, Canonlat now acknowledges that "there is no choice of law clause expressly requiring that Florida law be applied to all substantive claims and ignoring any conflict of laws analysis." Resp. p. 14. Rather, the choice of law provision provides that the *Agreement* shall be governed by and construed in accordance with Florida law. Accordingly, Canonlat is not entitled to the declaration it seeks in its Amended Complaint on this issue, and summary judgment will be granted in favor of Lantech on this claim.

C. Non-Exclusivity Clauses

Finally, Canonlat requests a declaration that the "non-exclusivity clauses" in the Agreement are valid and enforceable. Because Canonlat already has a judgment on Count III, which alleged a breach of the Agreement, the only possible relevance of these clauses is as they relate to Lantech's claims under Law 6209. As Canonlat recognizes in its Reply, "[n]o Law 6209 claim] is plead in the Amended Complaint or by

Affirmative Defense, and there is no counterclaim." Reply p. 6.

This Court's authority is limited by the Constitution to resolution of "cases" and "controversies." U.S. Const. Art. III, § 2. Whether a case and controversy exists depends on "'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Wendy's Intern., Inc. v. City of Birmingham*, 868 F.2d 433, 436 (11th Cir. 1989) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). The Court agrees with Lantech that there is no case and controversy before this Court to warrant a declaration regarding the validity and enforceability of the non-exclusivity clauses. Accordingly, Canonlat's motion for summary judgment on this issue will be denied.[9]

## II. Count II - Anti-Suit Injunction

Canonlat requests that this Court enter a permanent injunction enjoining the Costa Rica proceeding. This Court has the discretionary power to

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[9] Canonlat's argument that Lantech has "waived" the lack of case and controversy because it did not assert it as an affirmative defense is rejected, in that the Court "has an ongoing obligation to, *sua sponte*, analyze and determine whether it has before it a justiciable case or controversy." *Paragon Mgmt. LL.C. v. Slaughter*, 437 F. Supp. 2d 1267, 1270 (N.D. Ala. 2006) (citing *Fitzgerald v. Seaboard System R.R.*, 760 F.2d 1249, 1251 (11th Cir. 1985)).

enjoin parties subject to its jurisdiction from pursuing parallel in personam litigation before foreign tribunals. *See, e.g., Kaepa Inc. v. Achilles Corp.*, 76 F.3d 624, 27 (5th Cir. 1996).

The Court thoroughly discussed the law on this claim in its prior Order, and adopts that discussion by reference herein. In summary, the Court applied the more liberal approach of *In re Unterweser Reederei Gmbh*, 428 F.2d 888 (5th Cir. 1970), *aff'd on rehearing en banc*, 446 F.2d 907 (1971), *rev'd on other grounds sub nom., M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), where the Court noted that antisuit injunctions have been granted by courts in equity when foreign litigation involving the same parties and issues would (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's in rem or quasi in rem jurisdiction; or (4) prejudice other equitable considerations. *Id.* at 890. This Court further found that the suit by Lantech frustrates the policy of this Court of enforcing FSCs, that Lantech's filing of the Costa Rica action had the evasive effect of attempting to avoid the FSC of the Agreement in the first instance, and that the Costa Rica proceeding was vexatious due to the one million dollar bond that Canonlat had to post in order to avoid losing its right to import its products into Costa Rica.[10]

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[10] The Court additionally found that even if it were to apply the more restrictive test and consider the concerns raised in *Mutual Service Casualty Co. v. Frit Industries. Inc.*, 805 F. Supp. 919 (M.D. Ala. 1992), *aff'd*, 3 F.3 d 442 (1993), an injunction would be proper; the action m Costa Rica does threaten this Court's

Lantech claims that issues of fact exist as to the initial requirements for an anti-suit injunction that the parties be sufficiently similar, arguing that Canonlat has failed to present any evidence that SB Technology is its agent or that its interests are otherwise being protected by Canonlat. However, this was not the basis of this Court's finding that the parties are substantially similar. Rather, the Court found that SB Technology was not a necessary party to the action:

> Assuming [Article 6] would apply to SB Technology, it can only be held liable for indemnity if Canonlat is held liable and fails to fully indemnify Lantech. Furthermore, if SB Technology is jointly and severally liable, as Lantech alleges, then Lantech can still pursue the claim against SB in Costa Rica. This Court finds that the existence of SB Technology as a party to the Costa Rica action should not prevent the issuance of an antisuit injunction.

Order p. 10.

Lantech offers the Declaration of Mr. Murillo in support of its argument that "SB Technology is jointly and severally liable under Public Law 6209." Memo. in Opp. p. 14 (citing Murillo Dec. ¶ 14A.) Although Mr. Murillo does make this statement, he subsequently states in paragraph 21 that the "legal conclusions a court will render under Public Law 6209 include ... C.

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jurisdiction, in that the choice of law provision provides that litigation as to the Agreement take place in Florida courts.

Whether Santa Barbara Technology is a primary, and not nominal party under Public Law 6209" and "E. If Lantech is enjoined from pursuing its Public Law 6209 claim against Canonlat in Cost[a] Rica, can Lantech still maintain its claim against SB Technology." The Court is therefore not persuaded by Mr. Murillo's conclusion regarding joint and several liability, and reaffirms its original finding that the existence of SB Technology should not prevent the issuance of an antisuit injunction. *See Mastercard Int'l. Inc. v. Argencard Socieded Anonima*, No. 01 CIV. 3027 (JGK), 2002 WL 432379, at *10 (S.D.N.Y. March 20, 2002) (holding identity of party requirement satisfied despite intervention of an additional party in foreign proceeding since party was not a necessary party to the action).

Lantech also argues that the claims are not sufficiently similar, in that it has stipulated to the breach of contract claim and the Court has dismissed the pending equitable claims, "'[y]et this did not dispose of the issues in the Costa Rican action pertaining to Public Law 6209." Memo. in Opp. p. 14. This situation was created by Lantech, which chose to file the Costa Rica action, rather than bringing its Law 6209 claim in this Court by way of counterclaim. As this Court noted in its prior Order,

> although it may be true that a written contract is not necessary for the enforcement of an exclusive distribution arrangement under that law, the Costa Rican complaint is replete with references to the Agreement, which is attached as an exhibit. In that complaint, Lantech alleges that the Agreement "includes several

> paragraphs which violate the law for Protection of Foreign Company Representatives" (Compl. p. 2, ¶ Third). Lantech requests that the court declare that Canonlat "terminated the distribution relationship," (Compl. p. 23, ¶ Fifth) and find that paragraphs 11 and 19 of the Agreement are "null and void." (Compl. p. 26, ¶Twenty-First). Therefore, the effect and enforceability of the Agreement are placed directly at issue in the Costa Rican action, and this Court finds that the actions are sufficiently similar.

The Court finds that the question of whether the claims are substantially similar should not be determined based on the issues which currently remain pending before this Court, but rather the issues which were initially raised in both proceedings. The Court reaffirms its finding that the issues are sufficiently similar.[11]

Accordingly, the Court further finds that Canonlat has met the requirements for a permanent antisuit injunction with respect to the Costa Rica proceeding.[12]

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[11] Because there is no Law 6209 claim currently before this Court, any issues of fact which pertain to that claim, as suggested by Lantech, are irrelevant.

[12] This Court again acknowledges that some courts have stated an additional requirement that the action in the enjoining court must be dispositive of the action in the foreign court. This Court finds that because of the significant overlap of issues in this case and the policy at issue, that is, the enforcement of a forum selection clause, the lack of this additional factor is not dispositive.

## III. Affirmative Defenses

Canonlat additionally moves for summary judgment as to Lantech's two affirmative defenses - unclean hands and equitable estoppel.

In order to establish the doctrine of "unclean hands" Lantech must prove the following two elements: "(1) the wrongdoing is directly related to the claim against which the defense is being asserted"; and (2) Lantech was "personally injured" by Canonlat's conduct. *Turner Greenberg Assoc., Inc. v. C&C Imports Inc.*, 320 F. Supp.2d 1317, 1335 (S.D. Fla 2004). "The doctrine of [equitable] estoppel is applicable in all cases where one, by word, act or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induces him to act on this belief injuriously to himself, or to alter his own previous condition to his injury." *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1076 (Fla. 2001) (quoting *State ex rel. Watson v. Gray*, 48 So. 2d 84, 87-88 (Fla 1950) (citation omitted)).

Lantech offers no legal support for its position that Canonlat's alleged violation of Law 6209 (1) constitutes "wrongdoing" which would prevent it from filing the claims raised in this lawsuit, or (2) constitutes inducement as to Lantech. Indeed, Lantech failed to even address Canonlat's argument regarding its affirmative defenses in its Memorandum of Law in Opposition, and furthermore stipulated to a judgment on Count III of the Amended Complaint. Finally, Lantech has demonstrated no injury as a result of Canonlat's conduct. Accordingly, summary judgment will be granted.

## IV. Attorneys Fees and Costs

Canonlat argues that it is entitled to an award of attorneys fees and costs as part of its compensatory damages, arguing that such damages are awardable for Lantech's breach of the forum selection clause. Canonlat did not allege a claim for breach of contract based on the FSC - rather, the FSC claim was for declaratory judgment, and the breach of contract count was based on the failure to pay for products. Although Canonlat may ultimately be entitled to costs as a prevailing party, upon proper motion, it is not entitled to costs as compensatory damages.

## CONCLUSION

The Court being otherwise fully advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Plaintiff Canonlat's Motion for Summary Judgment (DE 206) is hereby:

**GRANTED** in part as to Count I, to the extent that the Court finds that the forum selection clause of the Agreement is valid and enforceable. The Motion is **DENIED** in all other respects as to Count I;

**GRANTED** as to Count II, and Lantech is hereby enjoined from taking any action in furtherance of the Costa Rica proceeding; and;

**GRANTED** as to Lantech's Affirmative Defenses.

2. Defendant Lantech's Motion for Summary Judgment is hereby **GRANTED** in part as to Count I, to the extent that the Court finds that the choice of law clause is not valid and enforceable as to all substantive claims, as alleged in the Amended Complaint. The Motion is **DENIED** in all other respects.

3. Plaintiff Canonlat's request for attorneys fees is **DENIED**. The request for costs is **DENIED** without prejudice.

**DONE AND ORDERED** this 18th day of July, 2007 at Miami, Florida.

/s/
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**Case No. 05-20297-CIV-COOKE/BROWN**

**[Filed September 29, 2006]**

| | |
|---|---|
| CANON LATIN AMERICA, INC., | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| vs. | ) |
| | ) |
| LANTECH (CR), S.A., | ) |
| | ) |
| Defendant. | ) |
| | ) |

## ORDER GRANTING SECOND RENEWED MOTION FOR PRELIMINARY INJUNCTION

**This matter** is before the Court on Plaintiff's Second Renewed Motion for Preliminary Injunction, filed July 6, 2006.[1] The Court has reviewed the Motion,

[1] On May 23, 2006, this Court denied the emergency nature of the original motion for injunctive relief stating "the basis for same is over one year old," but reserved ruling on the request for injunctive relief. On June 5 and July 6, 2006, Canonlat filed its

the Response and the Reply. In addition, an evidentiary hearing was held on August 8, 2006, and the Court adopts the transcript of that hearing by reference herein.

## FACTS

In 1996, Canon Latin America ("Canonlat"), a Florida corporation headquartered in Miami, Florida, entered into a distributorship agreement with Lantech (CR), S.A. ("Lantech"), a Costa Rican corporation. In 2003, the parties entered into a superseding distribution agreement ("the Agreement"). Both the original and superseding agreements were negotiated at arms-length, and entered into voluntarily. Paragraph Nineteen (19) of the Agreement, the "Choice of Law and Forum" clause, states, *inter alia,* as follows:

> 1.1 CANONLAT hereby appoints Distributor as a *non-exclusive* authorized distributor of the CANON® brand products listed in the Sales and Service Terms Schedule attached hereto as Schedule A, ... (emphasis added).
>
> * * *
>
> 2.4 Distributor acknowledges that its appointment hereunder as an authorized Canon distributor of the Products within the Territory is *non-exclusive,* and that CANONLAT reserves the right, without notice to Distributor, to make

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renewed and second renewed motion for preliminary injunction, respectively.

direct sales of any Products to End Users within the Territory and to appoint other distributors ... (emphasis added).

* * *

19. CHOICE OF LAW AND FORUM

THIS AGREEMENT IS MADE WITHIN THE STATE OF FLORIDA AND SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF FLORIDA. IF A DISPUTE ARISES AS A RESULT OF THE TERMINATION OF THIS AGREEMENT PURSUANT TO PARAGRAPHS 11 OR 15.3 ABOVE, AND IF SUCH DISPUTE CANNOT BE SETTLED THROUGH NEGOTIATION, THE PARTIES AGREE FIRST TO ATTEMPT IN GOOD FAITH TO RESOLVE THE DISPUTE BY MEDIATION IN MIAMI, FLORIDA, ... **IN THE EVENT OF ANY LITIGATION BETWEEN THE PARTIES, DISTRIBUTOR CONSENTS TO THE JURISDICTION AND VENUE OF THE STATE AND FEDERAL COURTS SITUATED WITHIN THE STATE OF FLORIDA UPON SERVICE OF PROCESS MADE IN ACCORDANCE WITH THE STATUTES OF FLORIDA AND THE UNITED STATES, RESPECTIVELY. DISTRIBUTOR FURTHER AGREES THAT ALL SUITS COMMENCED BY DISTRIBUTOR AGAINST CANONLAT UPON ANY AND ALL CAUSES OF ACTION, WHETHER OR NOT SUCH CAUSES OF ACTION HAVE ARISEN**

**UNDER THIS AGREEMENT AND REGARDLESS OF THE LEGAL THEORY UPON WHICH SUCH CAUSES OF ACTION ARE BASED, SHALL BE BROUGHT EXCLUSIVELY IN A STATE OR FEDERAL COURT SITUATED WITHIN THE STATE OF FLORIDA. * * ***

Agmt. ¶ 19. (emphasis added)

Carlos J. Crosa, Canonlat's General Sales Manager, testified that in March, 2004, Lantech was not current with its account, and Canonlat communicated with Lantech many times, trying to collect with no success. Canonlat hired a new distributor, Santa Barbara Technology, S.A. ("SB Technology"), and notified Lantech.

On November 11, 2004, Lantech filed an action against Canonlat in Costa Rica seeking indemnity from Canonlat as well as SB Technology, claiming damages in the amount of $6,303,366.89, under Costa Rica Law No. 6209, entitled Representatives of Foreign Companies Act.[2] Mr. Crosa testified that by this

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[2] The pertinent portion of that law states as follows:

> **Article 2. (Recission of the agreement for reasons alien to the representative, distributor or manufacturer. Consequences).** If the representation, or distribution or manufacturing agreement is rescinded for reasons beyond the control of the representative, distributor or manufacturer, or when the term of the agreement expires and it is not extended for reasons beyond the control of the same, the foreign company shall

action, Lantech terminated the Agreement, which was never previously terminated by Canonlat. Canonlat did not learn of the suit until it was advised of same in January, 2005 by S.B. Technology. Even after the lawsuit was filed, Canonlat continued to receive communications from Lantech regarding meeting to try to resolve the collection dispute. Mr. Crosa testified that Canonlat did not terminate its relationship with Lantech until it was unable to collect the payment.

On December 14, 2004, without prior notice to Canonlat, the Costa Rican court required Canonlat to post a one-million-dollar bond ($1,000,000.00) or discontinue importing goods to Costa Rica. After being informed of the lawsuit in January, 2005, Canonlat posted the bond, retained an attorney in Costa Rica and unsuccessfully tried to have the case moved to the United States, moved to dismiss the Costa Rica action for lack of jurisdiction. Mr. Crosa testified that the Costa Rica lawsuit has cost Canonlat "a significant amount of money" and has caused damage to its brand in Costa Rica.

On February 1, 2005, Canonlat filed in this Court, pursuant to the Agreement, an initial complaint for declaratory and injunctive relief. On May 11, 2005, Canonlat filed a six (6) count Amended Complaint seeking/alleging: a declaratory judgment as to the

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indemnify them with an amount calculated on the basis of the equivalent of four months of gross profits for each year or fraction of time passed. The value of the indemnity in no event shall be calculated for a period exceeding nine years of service. * * *

choice of law and forum provision of the Agreement (Count I); an injunction enjoining the parties from litigating in Costa Rica (Count II); breach of contract, alleging that Lantech failed to pay Canonlat for its products in Florida (Count III); open account (Count IV); "account stated," seeking back costs (Count V) and unjust enrichment, seeking damages (Count VI).[3]

At the hearing before this Court, Costa Rican attorney Claudio Muriello testified that Canonlat's act of appointing another distributor after twenty nine years of an exclusive commercial relationship might be considered a breach of contract pursuant to Law No. 6209, and that a written contract is not necessary to institute a proceeding under that section. He further explained that pursuant to the Costa Rican Civil Code and Costa Rican jurisprudence there exists a "reality" contract, which is not what the parties wrote, nor what the parties intended to do, but rather, how, in reality, it was performed by the parties. In interpreting the contract, a judge does not address only the written contract, but should also investigate the circumstances surrounding how, when and where the contractual obligations were applied. In other words, a written contract is considered important evidence, but not the sole piece of evidence.

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[3] On May 27, 2005, District Judge Cooke issued an Order dismissing Lantech's original complaint for lack of personal jurisdiction, which was later vacated on October 20, 2005. On June 28, 2006, this Court denied Lantech's renewed motion to dismiss the amended complaint and compel medication, finding that the Court has personal jurisdiction over Lantech.

Canonlat proffered the testimony of Costa Rican Attorney Abaro Caraza, who would have testified that (1) under Art. 1022 of the Costa Rica Civil Code, Cost Rica recognizes and enforces contracts between parties; (2) under Law No. 6209, it is necessary for there to be the existence of a contractual relationship between the parties before the court can award indemnification damages; (3) there is no law or case law in Costa Rica that converts a sole distributorship into an exclusive one; (4) the Costa Rica complaint is an ordinary process similar to a declaratory judgment in the United States; and (5) the Costa Rica complaint is not exclusively a complaint containing a statutory claim.

## DISCUSSION

Canonlat requests that this Court issue an order enjoining Lantech "from taking any action in furtherance of the Costa Rica proceeding until the time this Court determines whether the Agreement's choice of law and forum selection provisions are valid and enforceable ...." Mot. p. 16.

This Court has the discretionary power to enjoin parties subject to its jurisdiction from pursuing parallel in personam litigation before foreign tribunals. *See, e.g., Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996). The Circuits have taken two different approaches as to when antisuit

injunctions should be granted.[4] Although all courts consider the issue of comity to some extent, the Fifth, Seventh and Ninth Circuits have ordered antisuit injunctions more liberally, *see Kaepa, supra*; *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425 (7th Cir. 1993); *E.&J. Gallo Winery v. Andina Licores, S.A.*, 446 F.3d 984 (9th Cir. 2006), while the Second, Third, Sixth and D.C. Circuits have adopted a more restrictive approach. *See Paramedics Electromedicina Comercial Ltda. v. GE Medical Systems Information Technologies, Inc.*, 369 F.3d 645 (2d Cir. 2004); *Compagnie des Bauxites de Guinea v. Ins. Co. of North Am.*, 651 F.2d 877 (3d Cir. 1981), *aff'd*, 456 U.S. 694 (1982); *Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992), *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

The Eleventh Circuit has not spoken directly on the issue, but has affirmed, without opinion, a decision by the Middle District of Alabama declining to enter an anti-suit injunction based on the restrictive approach. *See Mutual Service Casualty Co. v. Frit Industries, Inc.*, 805 F. Supp. 919 (M.D. Ala. 1992), *aff'd*, 3 F.3d 442 (1993). This decision is not binding on this Court, however, in that when a judgment is affirmed by an appellate court without an opinion, the affirmance "has no precedential effect and can not be read as necessarily approving of the district court's reasoning." *Diesel Machinery, Inc. v. B.R. Lee Industries, Inc.*, 418

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[4] The traditional four prong preliminary injunction inquiry is not applicable. *See, E.&J. Gallo Winery v. Andina Licores, S.A.*, 446 F.3d 984, 990-91 (9th Cir. 2006).

F.3d 820, 830 (8th Cir. 2005) (citing *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979)); *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975)(Burger, C.J., concurring) ("When we summarily affirm, without opinion ... we affirm the judgment but not necessarily the reasoning by which it was reached.").

In *Mutual Services*, the Middle District of Alabama, not believing itself bound by then existing Fifth Circuit precedent[5], adopted the "restrictive approach" of the District of Colombia in *Laker Airways, supra*, finding that "injunctions of foreign proceedings are appropriate when necessary to prevent a 'miscarriage of justice,'" which "will most often exist, first, when the foreign courts' action threatens the jurisdiction of the enjoining court or, second, when a party attempts to evade or frustrate a forum's important public policies by litigating in a foreign court." *Id.* at 923-24 (citing *Gau Shan Co.*, 956 F.2d at 1354-55; *China Trade & Dev.*, 837 F.2d at 3; *Laker Airways*, 731 F.2d at 927). Rejecting a more liberal test, the *Mutual Services* court found that "the power to enjoin foreign proceedings raises significant and substantial issues of international comity and sovereignty" and that "it is a well established part of this country's jurisprudence that, when two sovereigns have concurrent in personam jurisdiction, one court will ordinarily not interfere with or try to restrain proceedings before the other." *Id.* at 922, 923.

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[5] Decisions by the former Fifth Circuit issued before October 1, 1981, are binding as precedent in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

At the time *Mutual Services* was decided there were two Fifth Circuit cases which had addressed the issue. In the first, *In re Unterweser Reederei Gmbh*, 428 F.2d 888 (5th Cir. 1970), *aff'd on rehearing en banc*, 446 F.2d 907 (1971), *rev'd on other grounds sub nom., M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), an admiralty case, the Court noted that antisuit injunctions have been granted by courts in equity when foreign litigation involving the same parties and issues would (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's in rem or quasi in rem jurisdiction; or (4) prejudice other equitable considerations. *Id.* at 890. The Fifth Circuit affirmed the district court's injunction preventing the owner of a tug from proceeding further with litigation concerning the same matter in an English court, giving no effect to a choice of forum clause selecting England to resolve disputes in the parties' agreement. The Court found that the district court had the discretion to decline jurisdiction on the basis of forum non conveniens, "[b]ut apart from the forum selection clause itself the circumstances supported a retention and determination by the district court." *Id.* at 894. The Court also noted that the "substantive rights" of the plaintiff, an American corporation which owned the rig which had been damaged while being towed by the tug, "will be materially affected if the dispute is litigated in an English court" because certain exculpatory provisions in the contract "are apparently contrary to public policy and unenforceable in American courts." *Id.* at 895. The Court therefore concluded that remanding the plaintiff "to a foreign forum, with no practical contact with the controversy, could raise a bar to recovery by a United States citizen

which its own convenient courts would not countenance." *Id.*[6]

After the Fifth Circuit affirmed en banc, the Supreme Court vacated the judgment and remanded the case, finding that "far too little weight and effect were given to the forum selection clause in resolving this controversy." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8 (1972). The Court found that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision," but found nothing in the record that would support the refusal to enforce the clause in that case, noting that the case the Fifth Circuit relied upon with respect to the exculpatory provisions did not apply. *Id.* at 15 (citations omitted); *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94 (1991) ("[A] clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended ...."); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1295 (11th Cir. 1998) (noting that forum-selection and choice-of-law clauses are "presumptively valid where the underlying transaction is fundamentally

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[6] The Middle District in *Mutual Services* found *Unterweser* to be distinguishable because in that case, the purpose of the injunction was "to prevent 'inequitable hardship' and frustration of the domestic court's policies regarding contracts," concerns the Court found were not present in the case before it. 805 F. Supp. at 924.

international in character.")[7]; *Kirby v. Norfolk Southern Railway Co.*, 71 F. Supp. 2d 1363 (N.D. Ga. 1999) (recognizing Fifth Circuit precedent, but distinguishing *Unteweser* and applying the restrictive approach because there was no forum selection clause involved in the case); *Manrique v. Fabbri*, 493 So.2d 437 (Fla. 1986) (finding that forum selection clauses should be enforced absent evidence that they are unreasonable or unjust).

In the other Fifth Circuit case, *Bethell v. Peace*, 441 F.2d 495 (5th Cir. 1971), the Court stated the "generally accepted rule" to be that:

> an American court will be willing to enjoin foreign proceedings which involve the same parties and the same cause of action: (1) where the foreign suit was brought by a resident of the forum state against another resident of the state to evade a protection provided for the latter under forum law * * * or where the foreign suit would be vexatious in other respects * * *."

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[7] The presumption of validity can be overcome "by a clear showing that the clauses are 'unreasonable under the circumstances.'" *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1362-63 (2d Cir. 1993) (citing *Bremen*, 407 U.S. at 10). This can be demonstrated when "(1) their formation was induced by fraud or overreaching; (2) the plaintiff effectively would be deprived of its day in court because of the inconvenience or unfairness of the chosen forum; (3) the fundamental unfairness of the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of such provisions would contravene a strong public policy." *Lipcon*, 148 F.3d at 1295. None of these circumstances exist in this case.

*Id.* at 498 (citing Ehrenzweig, Conflicts of Law at 129-30 (1962)). The Court found that the plaintiff should not be subject to the expense and vexation of a Bahamian suit where, at the time it was deciding the motion for anti-suit injunction, the Florida federal district court had already declared the real estate contract at issue in the Bahamian suit to be invalid on its face. *Id.*[8] *See also Kaepa,* 76 F.3d at 627 (noting that even though the standard in *Bethell* and *Unterweser* focused on the potentially vexations nature of foreign litigation, it "by no means excluded the consideration of principles of comity," but stating that the Court "decline[s] ... to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action.")

This Court finds the Ninth Circuit's decision in *Gallo* instructive.[9] There, the plaintiff sought a preliminary anti-suit injunction against its Ecuadorian distributor, Andina Licores ("Andina"), which had brought suit in Ecuador in violation of the parties' distribution agreement that specified California as the exclusive forum for all litigation. 446 F.3d at 987-88. Andina's claims in Ecuador were based on a revoked

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[8] The *Mutual Services* court distinguished *Bethell* by noting that the foreign action was enjoined "to prevent relitigation of [an] issue decided on the merits." *Id.* at 922 n. 3.

[9] The Court agrees with *Lantech* that the Ninth Circuit in *Gallo* was presented with actions on the part of the defendant which created a more vexatious situation than that involved in the instant case, but does not find that this renders the case inapplicable.

Ecuadorian law which was designed to protect Ecuadorians that were agents, distributors, or representatives of foreign companies. *Id.* at 987. The district's court's denial of an anti-suit injunction was reversed by the Ninth Circuit, which determined that if any of the four factors announced in *Unterweser* were met, "and if the impact on comity is tolerable," the injunction should have been granted. *Id.* at 991. The court initially analyzed whether the parties and the claims were the same, and found that they were, noting that in the Ecuadorian court, Andina sued for breach of contract, and in the district court, Gallo sought, *inter alia*, a declaration that Gallo did not breach the distributorship agreement. *Id.* The court additionally noted that to the extent that Ecuadorian law would apply, the federal court would be capable of applying it to the defendant's claims pursuant to Fed.R.Civ.P. 44.1. *Id.*

The court then discussed the importance of the forum selection clause, noting the Supreme Court's decisions in *M/S Breman* and *Carnival,* and determined that "[w]ithout an anti-suit injunction in this case, the forum selection clause effectively becomes a nullity." *Id.* at 992; *see also Paramedics,* 369 F.3d at 652 (affirming anti-suit injunction where foreign proceedings breached an arbitration clause). After noting that the defendant "ha[d] not given any reason to set aside the forum selection clause," the court held that defendant's "pursuit of litigation in Ecuador, in violation of the forum selection clause, frustrates a policy of the United States courts and may well be vexatious and oppressive." *Id.* at 993. *See also Farrell Lines, Inc. v. Columbus Cello-Poly Corp.,* 32 F.

Supp. 118 (S.D.N.Y. 1997), *aff'd,* 161 F.3d 115 (2d Cir. 1998).

This Court finds that it is bound by *Unteweser* to follow the liberal approach, given the existence of the forum selection clause. The Court further finds that the suit by Lantech frustrates the policy of the United States courts of enforcing forum selection clauses. Lantech attempts to distinguish its situation, by noting that it filed the Costa Rica action first. However, the Court finds that Lantech's filing of the Costa Rica action had the evasive effect of attempting to avoid the forum selection clause of the Agreement in the first instance. The Court further rejects Lantech's argument that the forum selection clause has no nexus to the Costa Rican statutory claim, in that Paragraph 19 of the Agreement provides that "*ALL SUITS* COMMENCED BY DISTRIBUTOR AGAINST CANONLAT UPON ANY AND ALL CAUSES OF ACTION, *WHETHER OR NOT SUCH CAUSES OF ACTION HAVE ARISEN UNDER THIS AGREEMENT AND REGARDLESS OF THE LEGAL THEORY UPON WHICH SUCH CAUSES OF ACTION ARE BASED*, SHALL BE BROUGHT EXCLUSIVELY IN A STATE OR FEDERAL COURT SITUATED WITHIN THE STATE OF FLORIDA." (emphasis added).

The Court also finds merit in Canonlat's argument that the suit is vexatious due to the one million dollar

bond that it had to post in order to avoid losing its right to import its products into Costa Rica.[10]

Lantech argues that an injunction should not issue because Canonlat has not met the initial requirements of the parties and actions being sufficiently similar. The Court disagrees with *Lantech* that the parties must be "identical," despite the use of that term by the Court in *Mutual Services.* Indeed, in one of the cases the court cites for that proposition, *Cargill, Inc. v. Hartford Accident and Indemnity Co.*, 531 F. Supp. 710, 715 (D. Minn. 1982), the parties were not "identical," in that there was a party in the United States action which was not a party in the foreign action. Other cases have allowed injunctions where the parties were "substantially similar," or where the "primary parties" are the same. *See, e.g., International Equity Investments, Inc. v. Opportunity Equity Partners, Ltd.*, No. 05 CIV. 2745 (LAK), 2006 WL 2060463, *5 (S.D.N.Y. July 26, 2006) (finding requisite similarity exists [w]here parties to the two actions are affiliated or substantially similar, such that their interests are represented by one another"); *Paramedics Electromedicina Comercial Ltda., v. GE Medical Systems Information Technologies, Inc.*, No. 02 Civ. 9369 (DFE), 2003 WL 23641529 (S.D.N.Y. June 4, 2003), *amended in part,* No. 02 Civ. 9369 (DFE), 2003

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[10] Even if Court were to apply the more limited concerns raised in *Mutual Services,* an injunction would be proper; the action in Costa Rica does threaten this Court's jurisdiction, in that the choice of law provision provides that litigation as to all disputes between the parties, whether under the agreement or not, be litigated in Florida courts and in accordance with Florida law.

WL 21697884 (S.D.N.Y. July 21, 2003), *aff'd,* 369 F.3d 645 (2d Cir. 2004) (holding identity of party requirement satisfied where subsidiary corporation that allegedly acted as agent for defendant was named in foreign suit, but no independent claim was alleged against it); *Motorola Credit Corp. v. Uzan,* No. 02 Civ. 666 (JSR), 2003 WL 56998, **2-3 (S.D.N.Y. Jan. 7, 2003); *Mastercard Int'l. Inc. v. Argencard Socieded Anonima,* No. 01 CIV. 3027 (JGK), 2002 WL 432379, *10 (S.D.N.Y. March 20, 2002) (holding identity of party requirement satisfied despite intervention of an additional party in foreign proceeding since party was not a necessary party to the action).

In this case, although SB Technology is an additional party named in the Costa Rica action, there are no independent claims made against it. Rather, liability is alleged based on the following Article of Law 6209:

> **Article 6. (Individual or corporation that partially or wholly assumes any business activity, which was performed previously by a foreign company through a representative, distributor or manufacturer. Liability).** The individual or corporation that partially or wholly assumes any business activity which was previously conducted by a foreign company through a representative, distributor or manufacturer shall be responsible for the continuity of the representation, distribution or manufacturing agreement, unless the foreign company had previously covered the pertinent indemnity.

See CR Compl. p. 21, ¶ Tenth). Assuming this Article would apply to SB Technology, it can only be held liable for indemnity if Canonlat is held liable and fails to fully indemnify Lantech. Furthermore, if SB Technology is jointly and severally liable, as Lantech alleges, then Lantech can still pursue the claim against SB in Costa Rica. This Court finds that the existence of SB Technology as a party to the Costa Rica action should not prevent the issuance of an antisuit injunction.

Lantech also argues that the claims are not similar, describing its action as one "premised on statutory violations of the Law for Protection of Foreign Company Representatives (Law No. 6209) and its status as a public policy statute. Lantech claims that the Costa Rica Action is not an action for breach of contract and that the proceedings are, therefore, not "the same." Although it may be true that a written contract is not necessary for the enforcement of an exclusive distribution arrangement under that law, the Costa Rican complaint is replete with references to the Agreement, which is attached as an exhibit. In that complaint, Lantech alleges that the Agreement "includes several paragraphs which violate the law for Protection of Foreign Company Representatives" (Compl. p. 2, ¶ Third). Lantech requests that the court declare that Canonlat "terminated the distribution relationship." (Compl. p. 23, ¶ Fifth) and find that paragraphs 11 and 19 of the Agreement are "null and void." (Compl. p. 26, ¶ Twenty-First).[11] Therefore, the

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[11] Additionally, Canonlat points out that Lantech, in its Costa Rican complaint, also includes several common law theories as an

effect and enforceability of the Agreement are placed directly at issue in the Costa Rican action, and this Court finds that the actions are sufficiently similar.[12]

To the extent that Lantech suggests that enjoining the action will deprive it of rights under a Costa Rican statute which represents a policy to protect private companies, that argument is rejected. By freely entering into the Agreement which contained the choice of forum and law provisions, Lantech itself chose to not avail itself of the protection of litigating its action in a Costa Rican forum. On remand in *Gallo,* the California district court noted:

> Andina's hope is that it might recover damages according to the formula specified by Decree No. 1038-A, which allegedly awards damages in an amount equal to the product of total yearly payments under the contract times the number of years the contract was in effect. That Andina would be forced to forego the possibility of a damage award that is so far removed from any reasonable concept of damages is hardly a depravation of legal remedy. The fact theforum

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alternative remedy or basis for recovery. *See* Affidavit of Lupita Quintero, Reply, Ex. B.

[12] This Court acknowledges that some courts have stated an additional requirement that the action in the enjoining court must be dispositive of the action in the foreign court. This Court finds that because of the significant overlap of issues in this case, the policy at issue, that is, the enforcement of a forum selection clause, as well as the limited scope of the injunction requested, the lack of this additional factor is not dispositive.

> or choice of law specified by a contract affords remedies that are different or less favorable to the laws of the forum preferred by a plaintiff is not alone a valid basis to deny enforcement of the forum selection and choice of law provisions.

440 F. Supp. 2d 1115, 1127 (E.D. Cal. 2006). Similar reasoning applies in this case. Furthermore, Lantech has not demonstrated that this Court is unable to apply Costa Rican law. *See Forzley v. Avco Corp. Electyronics Div.*, 826 F.2d 974 (11th Cir. 1987).[13]

## CONCLUSION

The Court finding that the relevant criteria for issuance of an antisuit injunction exist, and being otherwise fully advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Plaintiff's Second Renewed Motion for Preliminary injunction is hereby **GRANTED**; and

2. Lantech is hereby enjoined from taking any action in furtherance of the Costa Rica proceeding until the time this Court determines whether the Agreement's choice of law and forum selection provisions are valid and enforceable, and a further order is entered by the Court.[14]

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[13] Additionally, Lantech's conclusory allegation that in the instant case, SB Technology "is not likely subject to this Court's jurisdiction" is unpersuasive.

[14] The Court acknowledges that SB Technology is also involved in that litigation. However, as explained infra, based on the theory

**DONE AND ORDERED** this 27th day of September, 2006 at Miami, Florida.

/s/
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

cc: Michael Diaz, Jr., Esq.
Traci H. Rollins Esq.

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on which Lantech is proceeding, SB Technology can only be held liable if Canonlat is determined to be liable. Because litigation of that issue is precisely what this Court is enjoining by this Order, Lantech must be enjoined from proceeding in any manner in the Costa Rica case.

## APPENDIX D

**IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

**NO. 07-13571-DD**

**[Filed February 13, 2008]**

| | |
|---|---|
| CANON LATIN AMERICA, INC., | ) |
| | ) |
| Plaintiff-Appellee, | ) |
| | ) |
| versus | ) |
| | ) |
| LANTECH (CR), S. A., | ) |
| | ) |
| Defendant-Appellant. | ) |
| | ) |

On Appeal from the United States District Court for the Southern District of Florida

**ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC**

Before: EDMONDSON, Chief Judge, DUBINA, Circuit Judge, and MARTIN,* District Judge.

PER CURIAM:

The Petition (s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

* Honorable Beverly B. Martin, United States District Judge for the Northern District of Georgia, sitting by designation.

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(2)

FILED
MAY 23 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1421

IN THE

# Supreme Court of the United States

CANON LATIN AMERICA, INC.,

*Petitioner,*

v.

LANTECH (C.R.), S.A.,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Every circuit agrees that the threshold requirement for an international anti-suit injunction is that the domestic suit and the foreign action involve the same parties and the same issues.

The question presented is whether the Eleventh Circuit properly found that a Costa Rican suit was not parallel to a domestic suit where: (a) the Costa Rican suit was based upon Costa Rican statutory rights with a mandatory jurisdictional provision that cannot be contractually waived under Costa Rican law; (b) those statutory rights are not at issue in the domestic suit; (c) the breach of contract claim in the U.S. was not at issue in Costa Rica; (d) the Costa Rican suit does not interfere with the domestic suit; and (e) the forum selection clause at issue was found to be unenforceable by the Costa Rican courts, both at the trial and appellate levels.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

No parent or publicly held company owns 10 percent or more of the stock in Respondent Lantech (C.R.), S.A.

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## RESPONDENT'S BRIEF IN OPPOSITION

## INTRODUCTION

Petitioner concedes that the circuits speak with one voice on the "threshold standard" for the issuance of a foreign anti-suit injunction. Therefore, the Petition does not present any legal issue of uncertainty for this Court to clarify. At best, it asserts a "misapplication of a properly stated rule of law," S. Ct. R. 10, which does not warrant this Court's intervention. Yet even the misapplication point is illusory, as any differences between the First, Ninth, and Eleventh Circuits can be traced to the contrasting factual scenarios facing those courts. This Court does not need to delve into such factual squabbles, nor does it need to devote time to comparing the Ecuadorian statutory and procedural regime at issue in the Ninth Circuit with the Costa Rican framework presented in this case.

Petitioner freely admitted below that the proceedings in the district court "ha[d] nothing to do with the substantive content of Costa Rican Law No. 6209," which was the subject of the Costa Rican action. In any circuit, such a concession is fatal to an anti-suit injunction. Recognizing that, Petitioner seeks to distract attention by pointing to a forum selection clause. Yet the Costa Rican trial and appellate courts both struck that clause as unenforceable because it violated Costa Rican statutory law. In this country as well, courts regularly recognize that forum selection clauses must yield to public policies embodied in statutes. This is not a departure from this Court's precedent on forum selection clauses, but rather a faithful application of it. In any event, the existence of a forum selection clause does not excuse Petitioner's need to satisfy the threshold criteria for a foreign anti-suit injunction. Petitioner simply fails to identify any split of authority or other compelling reason necessitating this Court's review.

Finally, this case is a poor vehicle for certiorari. Because the Eleventh Circuit found the failure to satisfy one of the threshold criteria dispositive, it did not engage in the remainder of the analysis. As Respondent argued below, Petitioner cannot prevail on any of those other criteria, which means that the outcome of the case would not change regardless of the questions framed in the Petition, and the posture of the case could even obviate the Court's need to actually answer those questions. This case also turns on factual issues (such as a comparison of the Costa Rican action to the domestic proceeding) and an evaluation of Costa Rican law (some of which is now in flux). Such matters do not beckon this Court's scrutiny.

## STATEMENT OF THE CASE

This case arises from the relationship between Petitioner Canon Latin America, Inc. ("Canonlat"), a supplier based in the United States and doing business in Costa Rica, and Respondent Lantech (C.R.), S.A. ("Lantech"), a Costa Rican corporation that served as the exclusive distributor for Canon brand photocopiers and related services in Costa Rica from 1976 until 2004. In 2004, Canonlat severed the exclusive distributorship by appointing SB Technology (C.R.), S.A. ("SB Technology") as an alternative distributor. Such a maneuver permitted SB Technology to take advantage of the investments in brand loyalty generated by Lantech over the previous decades. Canonlat's decision sounded the death knell for Lantech's business; it no longer conducts business operations. Lantech accordingly initiated an action for damages in Costa Rica based on the Costa Rican "Law for the Protection of Foreign Company Representatives" ("Law 6209") against both Canonlat and SB Technology.

Law 6209 protects Costa Rican distributors from a variety of acts by a foreign company, including unilateral termination of an exclusive distributorship. *See* Art. 4(e); Pet. at 2-3. Article 7 of that law contains an express jurisdictional limitation and anti-waiver clause: "The jurisdiction of the

Costa Rican courts of justice and the rights of the representative, distributor or manufacturer, by virtue of this law, cannot be waived." Article 6 makes a new distributor (such as SB Technology) liable for damages in some circumstances. Law 6209 protects Costa Rican distributors when a foreign supplier tries to undercut a local distributor that has invested time and resources in building brand recognition and loyalty. Accordingly, Law 6209 makes jurisdiction and liability dependent only on the parties' actual relationship, and independent of any contract signed by the distributor.

As part of the Costa Rican action, Lantech asked that Canonlat be required to post an indemnity bond pursuant to Article 9 of Law 6209. The Costa Rican court ordered Canonlat to post a guarantee for roughly one-sixth of the claimed damages, or one million dollars, to ensure that Canonlat would abide by its orders. Article 9 requires courts to impose a bond sufficient to guarantee that the local distributor will be paid in full should it succeed, giving courts discretion to require a bond equal to the entirety of claimed damages.

Relying on a choice of forum clause favoring Florida in its standard form contract, Canonlat moved to dismiss Lantech's Costa Rican action for lack of jurisdiction. It also initiated the present action in the Southern District of Florida to enjoin the Costa Rican suit. In the domestic action, Canonlat claimed: (1) a declaratory judgment on the enforceability of the forum selection clause; (2) a breach of contract (for non-payment of certain goods); and (3) relief under various quasi-contract theories. As Canonlat later conceded, these claims "ha[ve] nothing to do with the substantive content of Costa Rican Law No. 6209," under which Lantech brought its Costa Rican suit. Dist. Ct. Doc.

240 at 1.[1] Lantech ultimately agreed to a judgment on the breach of contract claim, which the court entered, and the parties stipulated to a dismissal of the quasi-contract counts, leaving only the declaratory judgment claim and the request for an anti-suit injunction. Pet. App. at 5a n.4. No party maintained that the resolution of the contractual counts had any effect on Lantech's claims under Law 6209.

Meanwhile, the Costa Rican court denied Canonlat's motion to dismiss, concluding that the contractual forum selection clause

> is of no effect, since a public policy law such as 6209 specifies that the jurisdiction of the courts of this country cannot be waived in this type of dispute.

Pet. App. at 5a n.3. Canonlat appealed this decision to a Costa Rican appellate court. A three-judge panel affirmed, holding that the forum selection clause was unenforceable because the protections of Law 6209 are unwaivable. Dist. Ct. Doc. 250, Ex. B, at 9 ("It is clear and obvious that the remission to the State of Florida jurisdiction violates the provisions of article 7 of Law 6209."). The case was remanded for proceedings on the merits.

Having lost in Costa Rica, Canonlat renewed its efforts to obtain an international anti-suit injunction to stop the Costa Rican court from reaching a judgment on the merits following the remand from the Costa Rican appellate court.

The district court obliged, issuing the requested anti-suit injunction. It held that Lantech's exercise of its rights under Costa Rican law "frustrates the policy of this Court of enforcing [forum selection clauses]" and that the bond

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[1] Filings in the district court case, *Canon Latin America, Inc. v. Lantech (CR), S.A.*, Case No. 05-20297-Civ-Brown (S.D. Fla.), are available on PACER at https://ecf.flsd.uscourts.gov/cgi-bin/login.pl. References in this Opposition to district court filings will be by docket entry number.

provision of Law 6209 was "vexatious." Pet. App. at 28a. The court acknowledged that neither party had asserted a claim based on Law 6209 in that action, and that the only relief sought was to block the Costa Rican suit. It also held that the action before it was *not* dispositive of the Costa Rican action. *Id.* at 31a n.12. But it nevertheless concluded that the issues were sufficiently similar to support issuance of the injunction. *Id.* at 27a, 30a-31a. Despite the recent decisions in Costa Rica reinforcing the importance of Law 6209 and its anti-waiver protections, the district court determined that enforcing Law 6209 was not the public policy of Costa Rica because of the pendency of the Central American Free Trade Agreement ("CAFTA"). Pet. App. at 25a.

Lantech appealed the district court's decision. In a *per curiam* opinion, the Eleventh Circuit applied the "threshold requirements" that "a district court may issue an anti-suit injunction only if: (1) the parties are the same in both the foreign and domestic lawsuits, and (2) resolution of the case before the enjoining court is dispositive of the action to be enjoined." Pet. App. at 7a-8a (internal quotation marks and brackets omitted). The Eleventh Circuit concluded that the second of these requirements was not satisfied because "Lantech's Costa Rican action hinges on statutory rights that are unique to Costa Rica and that cannot be resolved by a judgment of the district court on Canonlat's claims in Florida." *Id.* at 9a-11a. Thus, the court vacated the anti-suit injunction without reaching the identity of the parties, the validity and enforceability of the forum selection clause, or any other issue. *Id.* at 11a & n.10.

## REASONS FOR DENYING THE PETITION

### I. This Case Does Not Present a Disagreement Between the Circuits.

#### A. Every Circuit Agrees on the Threshold Factors For an International Anti-Suit Injunction.

Every circuit applies the same threshold factors before granting an anti-suit injunction. As admitted by Canonlat:

> The initial test, as defined by *each of these circuits*, requires that the enjoining court determine, first, whether the parties and the claims in both the foreign and domestic litigation are the same, and second, whether the action before the enjoining court is dispositive of the action to be enjoined.

Pet. at 4 (emphasis added). Though stated slightly differently from case to case, these threshold factors are well-established in every circuit. *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 34, 36 (2d Cir. 1987) (the "threshold requirements" are "(1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined"); *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 991 (9th Cir. 2006) (the threshold step is "to determine 'whether or not the parties and the issues are the same, and whether or not the first action is dispositive of the action to be enjoined'"); *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 18 (1st Cir. 2004) ("The gatekeeping inquiry is, of course, whether parallel suits involve the same parties and issues."); *Philips Medical Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993) (noting that courts require, at a minimum, "a duplication of the parties and the issues"); *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 928 (D.C. Cir. 1984) (same); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349,

1353 (6th Cir. 1992) (same); *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 127 (3d Cir. 2002) (a finding of a "duplication of issues" is the beginning of the inquiry). Therefore, although they may differ on the balance of the anti-suit injunction analysis (matters that the Eleventh Circuit did not address), the circuits have reached unanimity on the threshold criteria.[2]

Not surprisingly, therefore, the Eleventh Circuit's opinion employs the same language as the First, Second, and Ninth Circuits to describe the threshold factors. Pet. App. at 7a-8a, 10a-11a. Indeed, the Eleventh Circuit adopted verbatim the Ninth Circuit's formulation of the factors in *Gallo*. *Id.* at 10a-11a ("[T]he standard . . . is 'whether or not the first action is *dispositive* of the action to be enjoined.' *Gallo*, 446 F.3d at 991."). And *Gallo*, in turn, borrowed from the First Circuit's decision in *Quaak*. *Gallo*, 446 F.3d at 991. The decision below was thus only the latest in a series of cases recognizing the settled threshold standard for anti-suit injunctions; it did not "add" to any "conflict between the Ninth and First Circuits." Pet. at 10 (emphasis omitted). An analysis of the facts of each case reveals that any differences between these cases only reflect these disparate factual settings – not any disagreement on the governing standard.

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[2] Canonlat concedes that the Eleventh Circuit's decision does not implicate the split that exists on the remaining factors for an anti-suit injunction. Pet. at 5 n.2 ("This is distinguished from the conflict which currently exists among the circuits . . . [which] is the subject of a pending petition for writ of certiorari in the case of *Goss Int'l Corp. v. Tokyo Kikai Seisakusho et al.*, Docket No. 07-618."). As Canonlat explains, "because the Eleventh Circuit in this case resolved the case on the question of the threshold test, it never reached the issue of which of the applicable legal standards applied." *Id.*

### B. The Eleventh Circuit's Decision Comports With *Quaak* and *Gallo*.

Because the Eleventh Circuit adopted (and quoted) the Ninth Circuit's standard on the threshold criteria, the Petition astutely avoids revealing to the Court the precise rule of law that Petitioners would invite this Court to adopt. This is an implicit recognition that any difference between the cases, real or imagined, must come from the application of settled law to specific facts—such as the weight given to foreign statutory law (or to decisions of foreign tribunals) in deciding whether two cases are parallel. Individual courts may weigh the facts of each case differently, but that does not create a circuit split. At best, this case presents a question of "the misapplication of a properly stated rule of law," which does not justify certiorari.[3] S. Ct. R. 10. Accepting certiorari will only mire this Court in sifting through (and weighing) factual matters and the idiosyncrasies of Costa Rican, and perhaps Ecuadorian, law.

1. The Ninth Circuit's decision in *Gallo* applied the basic principles later adopted by the Eleventh Circuit to facts that were the opposite of this case. Its decision on the threshold factors was based on the key factual finding that "[i]n the Ecuadorian court, Andina sued for breach of contract." *Gallo*, 446 F.3d at 991. Because the Ninth Circuit found that the very same contractual claims were before the district court, it found that the threshold factor was met. *Id.* ("[A]ll the issues before the court in the Ecuador action are before the court in the California action. . . . the parties and claims are the same.").

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[3] The footnote in the Eleventh Circuit's opinion that appears to be the foundation of the Petition, (Pet. App. at 8a n.8) confirms this point by emphasizing that the "requirement" is the same everywhere, but some courts might be more "strict[]" in application than others.

Canonlat insists, however, that Andina actually had a statutory (not contractual) claim akin to Lantech's. Yet the Ninth Circuit clearly stated that Andina's only claim in Ecuador was contractual. *Id.* The statute on which Andina had originally based its claims was imposed by a military dictatorship and "had been repealed" seven years earlier. *Id.* at 987-88 ("Andina sued under the Decree in spite of its revocation several years before."). Moreover, Ecuador's own courts had dismissed (and affirmed the dismissal of) Andina's claims. *Id.* As a result, the Ninth Circuit found that the only viable claim in the Ecuadorian courts was for a breach of contract – the same claim pending in the U.S. Not only that, but the Ecuadorian court explicitly held that "the forum selection clause was valid and that the claim should be heard in California." *Id.* at 988.

2. In contrast to the facts in *Gallo*, the Eleventh Circuit recognized that: (1) the Costa Rican courts had held the forum selection clause unenforceable based on the statute's mandate that Law 6209 claims could not be contractually waived; (2) Law 6209 was a valid law, as recognized by the Costa Rican judiciary; (3) the breach of contract claim pending in the U.S. was not at issue in Costa Rica; and (4) no Law 6209 claim – the subject of the Costa Rican action – was brought in the U.S. It is little wonder, based on these facts, that the outcome differed between *Gallo* and this case.

Indeed, Canonlat effectively conceded the point below: "This case . . . has nothing to do with the substantive content of Costa Rican Law No. 6209." Dist. Ct. Doc. 240 at 1. And it echoed this by framing the question presented as a situation "where the claims raised in the action to be enjoined are not identical to those pending before the enjoining court." Pet. at ii. If the Costa Rican statutory claim "has nothing to do" with and is "not identical" to the domestic action, how does Canonlat prevail under the Ninth Circuit's standard that the domestic action be "dispositive" of the foreign proceeding? The Eleventh Circuit rightly held that the independent statutory claim was nothing like Canonlat's claim of

nonpayment for certain goods. Pet. App. at 9a ("Lantech's Costa Rican action hinges on statutory rights that are unique to Costa Rica and that cannot be resolved by a judgment of the district court on Canonlat's claims in Florida."). And the Eleventh Circuit gave Canonlat the benefit of the Ninth Circuit's standard, quoting it word for word. Pet. App. 10a-11a.

3. Canonlat's reliance on *Quaak* to evidence a split is even more perplexing in light of its confession that it is not sure what *Quaak* means. Pet. at 16 ("the First Circuit in *Quaak* did not expand on the meaning of 'substantially similar'"). *Quaak* is just another application of the same standards to different facts. There, the defendant in a U.S. bankruptcy case fled to Belgium to obtain an order halting discovery before the U.S. court. *Quaak*, 361 F.3d at 14, 20. The U.S. court responded with an anti-suit injunction. Rather than "belabor the obvious," the First Circuit disposed of the threshold factors in short order. *Id.* at 20. The Belgian suit was not merely parallel—it was interdictory. The issue before each court was which would retain jurisdiction over the action.

*Quaak* does not conflict with *Gallo* or the Eleventh Circuit's opinion, and Canonlat searches in vain for any difference between the approaches. Unsure about how to characterize *Quaak* to its advantage, Canonlat suggests that it "is *likely* more akin" to *Gallo* than to the decision below. *Id.* at 17 (emphasis added). As each court relied upon the other, it would be more accurate to say that the holdings in *Quaak*, *Gallo*, and the court below were all "akin." Of course, since Canonlat does not have a precise legal framework for this Court to adopt, it is simply at a loss for what it should do with *Quaak*. It eventually attempts to contrast *Quaak* with the "strict identity requirement" allegedly applied by the Eleventh Circuit. Pet. at 16-17. But in no sense can the Eleventh Circuit be considered to have imposed a "strict identity requirement" when Canonlat admitted that the domestic action had "nothing to do" with Law 6209.

## II. The Threshold Factors, Accepted by Every Circuit, Are Not in Conflict With Other Lines of Cases on Forum Selection Clauses.

Canonlat argues that because the Eleventh Circuit had "no reasoned basis" for refusing to enforce the forum selection clause, it violated this Court's general jurisprudence on forum selection clauses in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), among others. Pet. at 20-21. Yet none of those cases addresses when it is appropriate to issue an anti-suit injunction to halt foreign proceedings. Since they do not implicate the issue decided by the Eleventh Circuit, it strains credulity for Canonlat to proclaim a conflict.

### A. There Is No Conflict Between the Eleventh Circuit's Decision and *Bremen* or *Scherk*.

1. The Eleventh Circuit applied the threshold factors for a foreign anti-suit injunction in accordance with decades of settled precedent. Even in *Gallo*, where the Ecuadorian court had already upheld the validity of the forum selection clause, the Ninth Circuit diligently applied each of the threshold factors before turning to the issue of a forum selection clause. *Gallo*, 446 F.3d at 991-92 (addressing threshold factors before considering forum selection clause). Enjoining a foreign court applying its sovereign law is a very different question from dismissing a domestic suit based on a domestic policy in favor of forum selection clauses.

Moreover, the forum selection clause was already held to be *unenforceable* in the proceedings in Costa Rica. Canonlat moved to dismiss the Costa Rican action for lack of jurisdiction based on the forum selection clause. The Costa Rican trial court denied the motion, holding that Law 6209 "specifies that the jurisdiction of the courts of this country cannot be waived." Dist. Ct. Doc. 250, Ex. A, at 14. Canonlat appealed, and a three-judge appellate panel affirmed Dist. Ct. Doc. 250, Ex. B, at 9-10. The Eleventh Circuit

rightly rejected Canonlat's attempts to overturn these judgments without a showing that the threshold factors were met.

The district court cases that Canonlat cites as supposedly in tension with the Eleventh Circuit actually support that decision because they all apply the threshold factors before considering the effect of a forum selection clause. *See Int'l Equity Invs., Inc. v. Opportunity Equity Partners Ltd.*, 441 F. Supp. 2d 552, 563 (S.D.N.Y. 2006) ("Having met the threshold anti-suit injunction requirements. . . ."); *Farrell Lines v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118, 130 (S.D.N.Y. 1997) ("Here, plaintiff meets the two threshold requirements."); *Int'l Fashion Prods. v. Calvin Klein, Inc.*, 1995 U.S. Dist. Lexis 2598, at *5 (S.D.N.Y. Mar. 7, 1995) ("Comparing IFP's pleadings in both actions, it is clear that both of these requirements are met."); *Suchodolski Assocs., Inc. v. Cardell Fin. Corp.*, 2006 U.S. Dist. Lexis 83169, *4-6 (S.D.N.Y. Nov. 16, 2006) ("In this action, the same Auction claim is at issue in both of the parallel proceedings.").[4] None of these cases rely on the general presumption in favor of forum selection clauses to obviate the need to consider the basic criteria of a foreign anti-suit injunction. Nor do they involve foreign statutes with express anti-waiver provisions.

Implicitly, Canonlat appears to be arguing that a forum selection clause is all that one needs to secure a foreign anti-suit injunction. There is a reason why Canonlat does not make this explicit. No court has ever accepted such a theory that a forum selection clause automatically trumps all contrary foreign laws, rulings of foreign courts, and every other consideration. Such a holding would contravene the teaching of *Bremen*: "We cannot have trade and commerce in

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[4] *Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 99 (2d Cir. 1999), involved arbitration and there is no arbitration agreement at issue here.

world markets . . . exclusively on our terms, governed by our laws, and resolved in our courts." *Bremen*, 407 U.S. at 9; *Scherk*, 417 U.S. at 519. Allowing Canonlat to enjoin the proceeding in Costa Rica under the same forum selection clause that its courts previously found unenforceable as contrary to Costa Rican statutory policy would signal that American companies are free to operate in Costa Rica unconstrained by its laws.

Once the threshold factors are met, courts may consider a forum selection clause in conjunction with the remaining anti-suit injunction analysis. *See, e.g.*, *Gallo*, 446 F.3d at 991. That would, of course, depend on the individual facts and circumstances of each case.

2. Canonlat also pretends that the Eleventh Circuit's decision conflicts with five securities cases from other circuits involving forum selection clauses. Pet. at 18. There is an easy response to these cases, all of which arise out of litigation relating to Lloyd's of London. First, none of those cases involved an anti-suit injunction, or anything like it, much less had occasion to opine on the threshold factors. Second, the Eleventh Circuit is in lockstep with this authority. *See Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285 (11th Cir. 1998). Indeed, *Lipcon* notes that the circuits are unified on the questions at issue in those cases. *Id.* at 1291. Canonlat cited *Lipcon* below to the Eleventh Circuit, and the court found no inconsistency between that holding and the result in the matter at hand.

**B. It Is Well-Settled That Public Policy, Especially Public Policy Expressed in a Statute, Can Trump Forum Selection Clauses.**

Although the petition warns that the decision below "threatens to render" forum selection clauses "all but irrelevant," Pet. at 5, 22-23, it is no different from many other decisions enforcing statutory limitations on forum selection clauses. The sky did not fall after any of them.

In light of Canonlat's inability to satisfy the threshold test for an anti-suit injunction, the Eleventh Circuit had no need to examine Costa Rica's statutory limitations on forum selection clauses. But if it had vacated the injunction on that ground, it would have been in good company. *Bremen* itself recognizes that forum selection clauses may not be enforced if "enforcement would be unreasonable and unjust," or if "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Bremen*, 407 U.S. at 15. Many states have acted in reliance on *Bremen*'s public policy exception, enacting statutes that make forum selection clauses unenforceable in a variety of circumstances.

Some states go so far as to make exclusive forum selection clauses *per se* unenforceable. MONT. CODE ANN. § 28-2-708 (2007) ("Every stipulation . . . in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals . . . is void."); IDAHO CODE § 29-110(2) (2008); *Schenck v. Motorcycle Accessory Warehouse, Inc.*, 2007 U.S. Dist. Lexis 28444 (D. Idaho Apr. 17, 2007) (noting that the Idaho statute applies to all contracts and denying enforcement of forum selection clause).

But more similar to the present dispute are numerous federal decisions invalidating forum selection clauses under state laws protecting local franchisees. For example, in *Jones v. GNC Franchising, Inc.*, 211 F.3d 495 (9th Cir. 2000), the Ninth Circuit held that a forum selection clause favoring Pennsylvania was void under California law. It found that the franchise statute rendering void forum selection clauses constituted a "strong public policy" and that the forum selection clause was therefore "unenforceable under the directives of *Bremen*." *Id.* at 498; *see also Solman Distribs., Inc. v. Brown-Forman Corp.*, 888 F.2d 170, 172 (1st Cir. 1989) (invalidating a forum selection clause based on Maine's franchise act, which prevents parties from waiving compliance with the act). Similarly, *E. & J. Gallo Winery v.*

*Morand Bros. Bev. Co.*, 247 F. Supp. 2d 973 (N.D. Ill. 2002), rejected a forum selection clause because it is "clear that the Illinois Beer Act embodies Illinois' strong public policy in favor of having these issues litigated within its borders," and that "[a]llowing a privately contracted forum selection clause to supersede the Beer Act and its policies would frustrate the intention of the statute."

There is nothing remarkable about Costa Rica's Law 6209 having a similar effect on a forum selection clause as the Illinois Beer Act. Costa Rica is thus not alone in subordinating forum selection clauses to a substantive public policy – a policy so important that the Republic emphasized that rights could not be contractually waived. The price of doing business in any state or country is abiding by its laws. Nothing requires (or permits) the United States to forcibly deny Costa Rica the ability to apply its laws to companies that operate in its territory. American courts regularly put substantive policies ahead of such clauses as directed by the legislature. If the Eleventh Circuit had reached this issue, there would have been no reason for it not to have done the same. And such a holding would moot both questions raised in the Petition.

**III. This Case Is a Poor Vehicle for Certiorari.**

As the Eleventh Circuit vacated the anti-suit injunction on the threshold criteria, it did not address the balance of the test. And even if this Court were convinced that the Eleventh Circuit created a conflict in its *per curiam* opinion, this case is a poor vehicle for resolving the conflict because of the myriad alternative grounds for reversal of the district court. In other words, the ultimate judgment of the Eleventh Circuit would not differ, regardless of the resolution of the questions framed in the Petition. These grounds, combined with the complex statutory framework of evolving Costa Rican law, further render this case unsuitable for review.

The circuits have considered a variety of factors in deciding whether to grant foreign antisuit injunctions,

including whether the foreign proceeding seeks to interfere with the domestic action, whether strong public policies of the domestic jurisdiction would be threatened by the foreign proceeding, general equitable considerations, whether the foreign proceeding is vexatious or oppressive, and comity, among others. *See, e.g., Gallo*, 446 F.3d at 989-92; *Laker Airways*, 731 F.2d at 927-30.

1. Before reaching those matters, the Court would have to decide whether Canonlat carried its burden on the "same parties" prong of the threshold test. *See, e.g., Gallo*, 446 F.3d at 991 (recognizing that the threshold test asks "whether or not the parties and the issues are the same"). The district court erred below because the parties in both actions were not the same. SB Technology – which has no corporate relationship to either Canonlat or Lantech – was not a party to the domestic action. Nevertheless, the district court's injunction precluded Respondent from pursuing its claims against both Canonlat and SB Technology (which is jointly and severally liable with Canonlat under Costa Rican law) in Costa Rica.

2. The Costa Rican court did not interfere with any domestic proceeding. A foreign anti-suit injunction may sometimes be justified where necessary to protect the enjoining court's jurisdiction. *China Trade*, 837 F.2d at 36 ("[I]f a foreign court is not merely proceeding in parallel but is attempting to carve out exclusive jurisdiction over the action, an injunction may also be necessary to protect the enjoining court's jurisdiction."); *Quaak*, 361 F.3d at 14, 20. But the Costa Rican action does not threaten the jurisdiction of any American court because no injunction of the latter proceedings was sought or obtained. The Costa Rican court, in fact, exhibited great restraint notwithstanding its American counterpart's meddling in its affairs.

3. Nor does public policy support an injunction. *Laker Airways*, 731 F.2d at 931 ("Antisuit injunctions are also justified when necessary to prevent litigants' evasion of the

forum's important public policies."); *Gallo*, 446 F.3d at 991. As explained above, there is no conflict between this Court's general policy in favor of forum selection clauses and application of Costa Rican public policy. Federal courts frequently find that forum selections clauses are unenforceable when faced with statutory anti-waiver laws. The United States has no interest in allowing Canonlat to operate in Costa Rica without being subject to its laws. Public policy favors Costa Rica's sovereign interest in protecting its distributors from what it has determined are predatory practices.

4. Equitable considerations do not favor an injunction in this case. *See Quaak*, 361 F.3d at 22 (recognizing that just like "any other injunction," an "international antisuit injunction . . . is an equitable remedy designed to 'bring the scales into balance'"). Here, the district court did not issue an injunction until after two Costa Rican courts had already ruled that the forum selection clause was enforceable under Costa Rican law. Having exhausted appellate review in Costa Rica, Petitioner should not get a third bite at the apple in the United States. As described above, many jurisdictions in the United States place similar restrictions on the enforceability of forum selection clauses. If Costa Rica was so concerned about its distributors as to make protections for them unwaivable, why should that public policy choice be freely ignored? It would be inequitable, to say the least, to forcibly stop Costa Rica from enforcing its laws while continuing to uphold similar state laws.

5. To the extent that some courts have considered "vexatiousness" to be a factor in anti-suit injunctions, all of those courts have found that it is the *initiation* of the foreign lawsuit – with the purpose of interfering with the American case – that might be vexatious. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996) ("Achilles's belated ploy of filing as putative plaintiff in Japan the very same claims against Kaepa that Kaepa had filed as plaintiff against Achilles

smacks of cynicism, harassment, and delay."); *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 10 F.3d 425 (7th Cir. 1993); *Gallo*, 446 F.3d at 985-89, 993, 995. Yet the only thing identified by the district court as "vexatious" was the application of Law 6209 to Canonlat in the form of the imposition of the bond. Pet. App. at 28a, 49a-50a. At the same time, Canonlat has never disputed the fact that the bond was properly imposed consistent with Costa Rican law. In fact, Article 9 of Law 6209 provides that the "foreign company must render a guarantee." If district court's interpretation of "vexatious" prevailed, then an anti-suit injunction would be appropriate whenever our laws differ from those of our neighbors. Following the district court's logic, foreign courts might issue anti-suit injunctions against American courts solely because of our discovery rules, or the possibility of punitive damages, both of which many foreign courts find distasteful.

6. In addition to the alternative grounds for reversal of the district court, this case arises from a complicated factual and statutory background. Not least of the complexities – which go unmentioned by Canonlat – is that Costa Rica recently ratified CAFTA. Annex 11.13 of that treaty requires Costa Rica to modify various parts of Law 6209, so that, among other things, the law "shall treat such contracts as establishing an exclusive relationship only if the contract explicitly states that the relationship is exclusive." Pet. App. at 25a. However, the implementing legislation preserves most of the statute and all claims that matured under the previous version of Law 6209.[5] It also grandfathers most existing relationships into the old regime. But this new legislation is not yet in force, and it is unclear whether any procedural aspects of the new laws will apply in the grandfathered cases or in cases (like Lantech's) which were

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5 The draft of the then-current implementing legislation was attached to Lantech's opening brief before the Eleventh Circuit at p. A-6 to A-12.

filed before the passage of CAFTA or before the implementing legislation took effect. Suffice to say that Costa Rican law is in flux, and the facts set forth in this case are not likely to recur.

## IV. Lantech Respectfully Requests That This Court Rule on the Petition Before the End of the Term.

The Eleventh Circuit has stayed the mandate in this case until this Court's decision on certiorari. In a recent order, the Eleventh Circuit clarified that the now-vacated injunction remains enforceable until this Court resolves the Petition. The effect of the stay of the mandate is to jeopardize Lantech's case in Costa Rica because the Costa Rican court said last year (before vacatur of the injunction) that it would not permit any further delays in the case. In essence, Lantech is at risk – despite vacatur of the injunction – that it may suffer our equivalent of dismissal for failure to prosecute. For this reason, Lantech respectfully requests that this Court rule on the Petition before the close of the October 2007 Term.

## CONCLUSION

For all of the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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# In The
# Supreme Court of the United States

CANON LATIN AMERICA, INC.,
*Petitioner*,

v.

LANTECH (C.R.), S.A.,
*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## PETITIONER'S REPLY BRIEF

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## INTRODUCTION

Lantech contends that the Eleventh Circuit's decision below represented "the latest in a series of cases recognizing the settled threshold standard for anti-suit injunctions. . . ." [Opp'n at 7]. But the threshold standard is by no means "settled." As the Eleventh Circuit recognized below, "[n]ot all circuits adhere strictly to the requirement that the action in the enjoining court be dispositive of the action to be enjoined or that the claims in both actions be the same." [App. at 8a, n. 8]. The conflict in this case stems from the Eleventh Circuit's unworkable requirement that a party seeking an anti-suit injunction demonstrate that the claims before the foreign court are strictly identical to those pending in the enjoining court, and the First and Ninth Circuits' practical realization that such a requirement, especially in international contracts, must be relaxed if forum selection clauses are to have any meaning.

The facts of this case make it an ideal vehicle for the resolution of this conflict. A U.S. business enters into a contract with a foreign company which contains a forum selection clause designating the courts of Florida as the only location where all claims can be filed. When a dispute arises, the foreign party files a lawsuit in its home court, rather than in the contractually agreed-to forum. A more typical, modern business scenario could not be conceived.

The petition should be granted.

## REASONS FOR GRANTING THE PETITION

### I. THIS CASE PRESENTS A CLEAR CONFLICT OVER THE THRESHOLD STANDARD THAT PARTIES SEEKING AN ANTI-SUIT INJUNCTION MUST SATISFY

Lantech contends that "[a]t best, this case presents a question of the misapplication of a properly stated ruled of law which does not justify certiorari." [*Id.* (internal quotation marks omitted)]. By way of example, Lantech argues that the Ninth Circuit's decision in *Gallo* "applied the basic principles later adopted by the Eleventh Circuit to facts that were the opposite of this case." [*Id.*]. Lantech is wrong.

The Ninth and Eleventh Circuits did not apply the same "basic principles." The Eleventh Circuit recognized as much, noting that its finding that Canonlat failed to satisfy the threshold standards for obtaining an anti-suit injunction conflicted with similar rulings by the First and Ninth Circuits. [App. at 8a, n. 8]. *Gallo* offers a paradigmatic example of this conflict.

In *Gallo*, the Ninth Circuit found that the threshold requirement was satisfied where all of the "issues" raised in the foreign proceeding were also before the enjoining court. *E. & J. Gallo Winery v. Andina Licores, S.A.*, 446 F.3d 984, 991 (9th Cir. 2006). In sharp contrast, the Eleventh Circuit here ruled that Canonlat could not meet the threshold requirement because Lantech's Costa Rican lawsuit turned "on statutory rights that are unique to Costa Rica and that cannot be resolved by a judgment of the district court

on Canonlat's claims in Florida [App. at 8a-9a]." In so ruling, the Eleventh Circuit made clear that injunctive relief would only be available to those parties who could demonstrate that the claims pending in the foreign court were "strictly identical" to the claims filed in the enjoining court.

In a further attempt to blur the conflict between the Ninth and Eleventh Circuits, Lantech contends that the *Gallo* decision turned on the Ninth Circuit's "key factual finding" that the "very same contractual claims" were before the U.S. and Ecuadorian Courts. [*Id.* at 8]. Lantech attempts to contrast this with the facts here, where, it claims, Canonlat "conceded" that "[t]his case . . . has nothing to do with the substantive content of Costa Rican Law No. 6209." [*Id.* (ellipses in original)]. Lantech not only misreads *Gallo*, it misstates Canonlat's position regarding Law 6209 below.

Lantech misconstrues *Gallo* by confusing the clear distinction between "claims" and "issues." As *Gallo* made clear, while the claims pending before the U.S. court involved the same issues pending in the Ecuadorian court – *i.e.*, whether the parties' contract was enforceable – only the Ecuadorian lawsuit specifically involved a statutory claim under foreign law. *E. & J. Gallo*, 446 F.3d at 991. That is the very same scenario at issue here. Because *Gallo* did not involve the same claims before the foreign and enjoining courts, Canonlat's alleged concession – that Costa Rica's Law 6209 had nothing to do with the U.S. action [Opp'n at 9] – is irrelevant.

The First Circuit's ruling in *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004), deepens the conflict here. Lantech mistakenly argues that *Quaak* "is just another application of the same standards to different facts." [Opp'n at 10]. But like *Gallo*, the First Circuit's decision in *Quaak* represents yet another interpretation of the meaning and application of the threshold standards for issuing an anti-suit injunction. The court of appeals recognized as much below, noting that while *Quaak* concluded that the threshold inquiry would be satisfied if the "parties and the claims are 'substantially similar,'" the Eleventh Circuit would require that they be identical. [App. at 8a, n. 8.]. Lantech adds that Canonlat is "not sure what *Quaak* means." [*Id.*]. Canonlat has never suggested any confusion over *Quaak's* meaning. [Pet. at 16-17]. It is apparent that the "substantially similar" standard adopted by the First Circuit in *Quaak* is at variance with the Eleventh Circuit's "strict identity" requirement and might represent a more relaxed version of the "similar issues" standard adopted by the Ninth Circuit in *Gallo*. Thus, if there is any "confusion," it is among the circuits as to the correct interpretation of the threshold standards for issuing an anti-suit injunction.

## II. THE ELEVENTH CIRCUIT'S RULING DEVIATES FROM THE COURT'S WELL-ESTABLISHED PRECEDENT FAVORING THE ENFORCEMENT OF FORUM SELECTION CLAUSES IN INTERNATIONAL CONTRACTS

### A. The Eleventh Circuit's Decision Below Threatens The Continued And Orderly Transaction Of International Business

Lantech dismisses the Court's decisions regarding forum selection clauses on the ground that they did not "address[] when it is appropriate to issue an anti-suit injunction to halt foreign proceedings." [Opp'n at 11]. Lantech misses the point. Though it acknowledged the existence of a forum selection clause here [App. at 2a-3a], the Eleventh Circuit did not heed *The Bremen's* warning against giving "far too little weight and effect" to such clauses. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8 (1972). The court of appeals' complete disregard for the parties' choice of forum threatens the Court's well-established policy of enforcing such clauses and undermines the predictability of international commercial relationships. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974).

Lantech's contention that forum selection clauses have historically taken a backseat to the threshold standards for issuing an anti-suit injunction [Opp'n at 11, 13] is misleading. In *Gallo*, the parties' agreement to litigate in California played a prominent, if not dispositive, role in the Ninth Circuit's evaluation of the threshold factors. Andina argued that Gallo could not

meet the threshold test for an anti-suit injunction "because enjoining the Ecuador action would deprive it of its right to pursue its claims under Ecuadorian law." *E. & J. Gallo,* 446 F.3d at 991. The Ninth Circuit rejected Andina's claim because "to the degree that Ecuadorian law does apply, federal courts are capable of applying it to Andina's claims." *Id. Gallo's* assurance that federal courts are able to apply foreign law only makes sense in the context of enforcing a forum selection clause that designated the U.S. as the site of litigation.

In 1974, the Court noted that forum selection clauses were "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction . . . ." *Scherk,* 417 U.S. at 516-17. Under the Eleventh Circuit's reasoning, a forum selection clause (or arbitration clause) would be unenforceable so long as a party can plead a claim wholly dependent on a country's specific statutory or common law. *See e.g. Roby v. Corp. of Lloyd's,* 996 F.2d 1353 (2d Cir. 1993).

The Eleventh Circuit has created a yawning gap in more than thirty years of precedent enforcing forum selection clauses in international business contracts. Lantech's only response is a promise that the sky will not fall. [Opp'n at 13].

### B. The "Public Policy" Embodied By A Foreign, Protectionist Statute Does Not Trump A Freely Negotiated Forum Selection Clause

Lantech contends that "nothing remarkable" [Opp'n at 15] occurred here, because at least two domestic states have enacted statutes making forum selection clauses unenforceable, while three federal courts have refused to enforce such clauses on public policy grounds. [*Id.* at 14-15]. Conceding that the court of appeals never considered the parties' forum selection clause in its analysis, Lantech erroneously concludes that "[i]f the Eleventh Circuit had reached this issue, there would have been no reason for it not to have done the same." [*Id.* at 15].

In *The Bremen*, the Court noted that "in light of present-day commercial realities and expanding international trade we conclude that the forum selection clause should control absent a strong showing that it should be set aside." *The Bremen*, 407 U.S. at 15. Recognizing that "uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws . . .," the Court explained in a later decision that forum selection clauses constituted "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherk*, 417 U.S. at 516.

Significantly, the Eleventh Circuit has previously followed the Court's directive, enforcing a forum selection clause in an international agreement. In

*Lipcon v. Underwriters at Lloyd's, London,* 148 F. 3d 1285, 1288 (11th Cir. 1998), a group of U.S. investors in Underwriters at Lloyd's filed suit in federal court for violation of U.S. securities laws. Although the Lipcons never signed an agreement containing choice of law and forum clauses in favor of England, for any dispute arising from the underwriting business, the court of appeals, in reliance on *The Bremen,* bound the Lipcons to the choice of law and forum clauses in the agreement. *Id.* at 1289, 1299. In reaching this conclusion, the Eleventh Circuit rejected the argument that the express venue provisions of, and public policy behind, the Securities Act of 1933 and the Securities Exchange Act of 1934 prohibited enforcement of the choice clauses. *Id.* at 1291-95. In so doing, the court of appeals acknowledged the Court's two main concerns in *The Bremen* and *Scherk:* "(1) ensuring 'the orderliness and predictability [that are] essential to any international business transaction," and (2) "furthering international comity." *Id.* at 1294 (internal citations omitted). *See also Diaz-Rosado v. Auto Wax Co.,* 2005 WL 2138794 (D.P.R. 2005) (explaining that "the fact that a Puerto Rico statute proscribes the applicability of forum selection clauses does not mean that the Court will automatically disregard the parties' freely negotiated contractual obligations . . . [a]ccordingly, [the] argument that Puerto Rico's public policy as set forth in Act 75 prohibits the enforceability of forum selection clauses lacks merit and does not prevent dismissal in this case.").

## III. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE CONFLICT AMONG THE CIRCUITS REGARDING THE THRESHOLD TEST FOR ISSUING AN ANTI-SUIT INJUNCTION

This case presents an ideal vehicle for certiorari because of the common set of facts it raises. Every day, companies around the world enter into written agreements that contain forum selection clauses. Those clauses are designed to afford the parties some measure of comfort and predictability. While many parties to such clauses honor their agreements to litigate (or arbitrate) in a particular forum, many others do not. Those who choose to violate those clauses will initiate costly litigation in other locations, further depriving the parties of the benefit of their original bargain. A similar fact pattern emerged in *Gallo* and even in *The Bremen,* where this Court enforced a forum selection clause requiring a U.S. party to settle its claims in London, as provided for in a written contract. Accordingly, the typical nature of the scenario presented here offers an ideal vehicle for resolving the dispute between the circuits regarding the threshold factors for obtaining an anti-suit injunction.

Lantech warns that review should be denied because of the "complex statutory framework of evolving Costa Rican law . . . ." [Opp'n at 15; *see also id.* at 18 (noting that "this case arises from a complicated factual and statutory background."). That Costa Rican law presents a moving target is all the more reason to grant review in this case; it highlights

why parties to international business contracts negotiate forum selection clauses in the first place. In deciding whether to adopt the Eleventh Circuit's "strict identity" requirement, or the more relaxed versions advanced by the First and Ninth Circuits, the Court need not need engage in a lengthy conflicts of law analysis. The Ninth Circuit in *Gallo* ruled on the enforceability of a wine-maker's entitlement to an anti-suit injunction, in light of Ecuadorian law, without engaging in a lengthy exposition of that country's law. Likewise, the Eleventh Circuit dissolved Canonlat's anti-suit injunction without conducting a protracted examination into Costa Rica's Public Law 6209. The Court here, in turn, disposed of *The Bremen* without engaging in a detailed comparison of U.S. and U.K. law.

Lantech further urges that review is inappropriate because "the Court would have to decide whether Canonlat carried its burden on the 'same parties' prong of the threshold test." [Opp'n at 16]. Review, in the first instance, would turn on the existence of a conflict among the circuits. In dissolving the anti-suit injunction, the Eleventh Circuit acknowledged that a conflict existed. [App. at 8a, n. 8 (noting a conflict between its ruling in this case and the First and Ninth Circuits)]. That conflict, according to the court of appeals, extended to the question of identity of the parties. [*Id.* (noting its disagreement with the First Circuit in *Quaak* which concluded "that the threshold inquiry is satisfied because the parties and the claims are 'substantially similar'")].

Next, Lantech contends that review would not be appropriate because "[t]he Costa Rican court did not

interfere with any domestic proceeding." [Opp'n at 16]. But Lantech knows that anti-suit injunctions are *in personam* and are not designed to "meddle" with the Costa Rican courts' jurisdiction. [App. at 27a-28a (*citing, Kaepa Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996)]. Here, Lantech specifically agreed to bring all of its claims in the courts of Florida. [App. at 2a-3a, 13a]. Consequently, the injunction in this case only targeted Lantech, as the party over whom the district court exercised *in personam* jurisdiction.

Lantech further maintains that "public policy" does not "support an injunction." [*Id.*]. What Lantech means to say is that Costa Rica's public policy does not support an injunction. U.S. public policy, which controls this discussion, favors a foreign anti-suit injunction to vindicate the parties' freely-negotiated forum selection clause. *The Bremen,* 407 U.S. at 15 (explaining that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene *a strong public policy of the forum in which suit is brought,* whether declared by statute or by judicial decision.") (emphasis added). Lantech adds that "there is no conflict between this Court's general policy in favor of forum selection clauses and application of Costa Rican public policy." [*Id.* at 17]. Yet, the Eleventh Circuit disregarded the public policy articulated by the Court in the *The Bremen* that forum selection clauses are *prima facie* valid and should be enforced. *The Bremen,* 407 U.S. at 10.

Lantech's additional claim that Canonlat's bid for a foreign anti-suit injunction constituted a "third bite at the apple," taken after two Costa Rican courts invalidated the forum selection clause [*Id.*], misses the

point. The Costa Rican courts should never have passed on the validity of the forum selection clause in the first place, because the parties agreed that all of their claims would be brought in the courts of Florida.

Finally, Lantech fears that the district court's logic could lead foreign courts to "issue anti-suit injunctions against American courts" based on laws they find to be "distasteful." [Cpp'n at 18]. Lantech ignores the fact that an anti-suit injunction is not used to express disagreement over another country's laws, but to enforce, as in this case, private agreements among parties to litigate in a particular jurisdiction.

## CONCLUSION

Petitioner requests that the petition for a writ of certiorari be granted.

Respectfully submitted,
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